CORPORATIONS AND THE STATE

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BY

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NEW YORK AND LONDON

D. APPLETON AND COMPANY

1911

Published October, 1911

Printed in the United States of America

THIS VOLUME IS RESPECTFULLY DEDICATED TO THE INSTRUCTORS AND STUDENTS OF THE UNIVERSITY OF PENNSYLVANIA AND TO NUMEROUS CITIZENS OF PHILADELPHIA, WHO GAVE GENEROUS ATTENDANCE AND RECOGNITION TO THE LECTURES UPON WHICH IT IS BASED

PREFACE

THE first six chapters of this volume contain the substance of a series of lectures delivered on the George Leib Harrison Foundation at the University of Pennsylvania in the months of November and December, 1910. The final chapter has been added since the decisions in the Standard Oil and American Tobacco Trust Cases were rendered by the Supreme Court of the United States, and aims to give an interpretation of these decisions and to forecast their probable effect upon the problem of regulating corporations in the future.

The cordial reception accorded these lectures by the audiences which attended them was followed by a request that they be published in book form. In complying with this request it has seemed best to preserve as far as possible the style in which they were given. They were delivered for the most part extemporaneously. Some revision has been made and expressions in anticipation of the decisions under the Sherman Antitrust Law have been omitted, but otherwise the first six chapters do not materially vary from the lectures as they were delivered.

The fourth chapter, on Banking Corporations, was included in the original plan for the lectures. This chapter is largely devoted to discussion of our mone-

tary and banking problems, and is accordingly not in entire harmony with the rest of the book, but in view of the prominence of this subject at the present time it has been included.

THEODORE E. BURTON.

WASHINGTON, D. C.,
August 1, 1911.

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CORPORATIONS AND THE STATE

CHAPTER I

ORIGIN AND DEVELOPMENT OF PRIVATE CORPORATIONS

IT is the purpose of these lectures to discuss the political, social, and economic conditions which have caused the growth of corporations, and to point out the relation which exists or should exist between such corporations and the state. It is not intended to neglect the form and organization of corporations which are subjects of undoubted importance, but particular attention will be given to the great tendencies and the general facts and principles which have caused the modern corporation to assume its importance in our economic and social life.

A corporation is a group of individuals empowered by law to act as a single person and endowed by law with the capacity for succession. It can own property, incur obligations, sue or be sued in the same manner as an individual, and its members usually enjoy the advantage of limited liability. While the personnel of a corporation may change

from time to time, the corporation itself can continue indefinitely. It is this feature of permanence which constitutes one of its chief advantages. Sir Edward Coke expressed his view of the corporation as follows: "A corporation is invisible, immortal, has no soul, neither is it subject to the imbecilities or death of the natural body." In the Dartmouth College case, the following definition was given: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law."

The idea of the corporation as an entity separate from the individuals composing it has often been emphasized to the point of absurdity and used as a means of escape for officers who were personally guilty of wrongdoing. This is no better illustrated than in the argument of the defendants in the North River Sugar case, to the effect that the corporation itself could only do what the law allowed it to do, that any other act was *ultra vires* and accordingly the act of individuals and not of the corporation.[1] The court refused to accept this reasoning and rightly held that the action of the majority of directors was the action of the corporation. This legal fiction has since become largely discredited; but we are still prone to forget that a corporation is composed of individuals, and that its directors and even its stockholders have their personal responsibilities to the general public.

[1] 121 N. Y., 582.

We should remember also that the corporation is an institution which, like all others, has been evolved from earlier and more primitive forms. It is but one manifestation of the innumerable instances of the association of individuals in society. The modern corporation is of comparatively recent origin, but as long ago as the Middle Ages, and even during the time of the Roman Republic, there existed organizations of individuals with corporate rights. These will be briefly discussed in the course of this chapter. They were of quite a different nature, and bore little resemblance to the present day commercial and industrial organizations and hence are only of passing interest.

Two factors assume especial importance in the progress of the human race: Increase of population, and association of the individual units which make up population.

The United States Census Report for 1900 quotes Adam Smith as saying:[1]

"The most decisive mark of prosperity of any country is the increase of the number of its inhabitants."

An increase in population indicates the absence of devastation by war or pestilence and the existence of a sufficient supply of food—conditions requisite for advancement in civilization. A substantial increase also makes possible entrance into new fields of endeavor, and the more perfect develop-

[1] Supplementary Analysis, p. 29.

ment of those enterprises and activities which are already in existence.

Advancement in civilization has usually been contemporaneous with increase of population. Rightly considered, however, increase of population is rather an indication than a cause of advancement. The two most populous countries of the world, China and India, have been marked by stagnation and lack of progress contemporaneously with the wonderful advance of other countries. It thus appears that the quality of population and its ability to promote increased effectiveness is more important than mere numerical increase.

Association is invariably in evidence wherever humanity has successfully striven to work out its problems. The fact of co-operation has ever been manifest, however baffling it may be to express its cause in exact terms; whether its origin is due to instinct, like-mindedness, or common interest is a question for the sociologist. If we were to use a single sentence to describe its existence we might say that association has its foundation in an intelligent exercise of the desire for human happiness, for life becomes tolerable and progress is made easy only where there is a readiness for the association or co-operation of individuals in some form of social organization. On this subject Mr. Carlyle very well said in one of his earlier essays:

"Such is society, the vital articulation of many individuals into a new collective individual; greatly

the most important of man's attainments on this earth; that in which, and by virtue of which, all his other attainments and attempts find their arena, and have their value."

The idea of association goes back to the very cradle of the human race. It is one of the first lessons of progress. It has made great accomplishments possible to man, for through association he has been able to conquer nature and transform the face of the globe. It extends to all phases of man's activities, to his work, his pleasures, his studies and his achievements. It means power united with power, force joined to force, genius multiplied by genius. By it the knowledge and skill of each becomes a source of blessing to all. It substitutes for the savagery and lack of humanity which belong to isolation, the beginning of all refinement and regard for human welfare.

The first distinct step in association was for religious or governmental purposes. It would be outside of the scope of this chapter to consume any considerable time in tracing the origin of the state or of forms of worship. According to the view of Aristotle, the family appeared first; when several families were united and association aimed at something more than merely supplying daily needs, then the village came into existence. When several villages were united into communities, perfect or large enough to be nearly or quite self-sufficing, the state came into existence. Along with this

process of evolution which gave rise to the state, numerous subdivisions or groups in society were gradually formed for common worship, or for the accomplishment of any object which required strength or skill greater than that belonging to a single individual.

Whatever may have been the specific form of association which led to political organization, the essential fact is that man's desire for associated action and social relationship caused the formation of various groups and organizations, and helpful development kept pace with his capacity for association. Thus the origin of the state, whether it proceeded from the family as a nucleus, from divine origin, from social contract, or from the acquisition of supremacy by a despot of superior strength and gift for command, is in any case an expression of a desire and capacity for that order and effectiveness which can only be obtained by the cooperation of individuals.

There are three general points connected with this subject which should be considered in their order: (1) That a close connection exists between political associations and private associations, or corporations, a connection the importance of which has been conceded, but not sufficiently elaborated. (2) That conditions have existed or did exist in earlier times such that the modern corporation with its characteristic features could not have succeeded until less than two hundred years ago, save by the

aid of monopolistic privileges. (3) That the natural growth of the corporation is characterized by three eras: (a) Monopoly. (b) Competition. (c) Combination—accompanied by state regulation.

It is a notable fact that in the most primitive times, extensive operations were largely conducted by the state itself, at times by despots who built great public works or undertook mammoth enterprises for their own comfort or for a display of their own munificence. The great pyramid probably contains a larger quantity of masonry than any detached structure in the world. The kings of Assyria and Babylonia built numerous canals and reservoirs to promote agriculture by irrigation. King Solomon is said to have organized a commercial department of state and engaged in foreign trade for personal gain.

It was not alone in the field of great public works and undertakings of this nature that the ancient state exerted itself. It became at times a trader, as in the case of Rome, when she brought great quantities of grain from subject provinces or obtained it by purchase, in order to furnish food for the imperial city. There it was sold or given out in largesses. To-day, living in places where transportation facilities are available by railroad and steamship, we forget how difficult in earlier days was the problem of furnishing a supply of food to great cities. Lack of food was, in a very important sense, a limit to their growth. This condition

was notable in the case of Rome and of Athens. The large colonies of Greece, such as Syracuse, and those in Asia Minor, for a time attained a more rapid growth than communities at home, because they were in the midst of great fertile fields, where supplies of food were more readily obtainable. This shows one reason for state activity; the welfare of the state, its very life depended upon feeding its people. Demosthenes, in his orations, mentions a class of regulations under which all those who sailed ships to Athens had to bring a certain quantity of grain, and there was another law that if the shipper from the Crimea unloaded any part of his cargo on the way, it was considered an offense punishable by death.

This activity of the state is still manifest in the carrying out of public works, such as the improvement of rivers and harbors, and the construction of public buildings. In a limited way, industries are still conducted by the state, as in the case of the porcelain manufacturers of Dresden, Vienna, Berlin, and of Sèvres, in France. This participation of the state in trade is still further illustrated by the monopoly of some specific article as a source of revenue. France, Spain, Italy, Russia, Servia, Greece, Turkey, even so advanced a commercial country as the Netherlands, preserve certain monopolies, such as in tobacco, salt, or matches, salt perhaps being the most common. The most lucrative monopoly is that of spirits, reserved by

Russia, from which the empire realizes an income of $360,000,000 a year. Indeed, these state monopolies to-day yield an aggregate revenue greater than the total revenue of the same countries seventy-five years ago.

We come next to a second stage, in which the state is in close partnership with the individual and which prevailed until less than two hundred years ago. Probably the best illustration of this class of enterprise is the East India Company, established in the year 1599. The Muskovy Company, established in 1555 in the reign of Philip and Mary, the Levant or Turkey Company, established in 1581, and one known as the New Zealand Company, organized as late as 1841, are other illustrations of this class. A characteristic feature of these organizations was that the state granted the charter and conferred a monopoly of trade. The grantee paid a large share of the profits to the state, and what perhaps is more important than all, agreed that all the territory acquired should be the property of the sovereign who granted the charter.

The East India Company was more a political than a commercial organization, notwithstanding the magnitude of its trade operations and of its capital which, proportionately to the wealth of the times was greater than that to-day of the Standard Oil Company or the United States Steel Corporation. Its duties to the government, its political side, absorbed more of its energy than the devel-

opment of trade. It was compelled to provide ports, docks, and facilities for future commerce. Then it was also necessary to maintain order among the people. To do this, the company had the right to make peace and war, to make treaties, to maintain a police force and even armies. Whenever any extortion or tyranny was charged to Lord Clive or Warren Hastings, they made the excuse that their course was necessary in order to perform the political functions which the sovereign imposed upon them. It was alleged that cruelty was practised because requisite to maintain order and supremacy. This form of organization existed, especially in England, for a very considerable time. North America was discovered by the Cabots under a charter which gave to them and their associates the exclusive right to trade in the countries discovered, or explored, but conferred upon the King of England title to all such territory.

We are often wont to think that rules in regard to corporations under any form of government at any particular time, are due to the caprices of kings, or to the theories of legislators, or as is sometimes said they are incident to the spirit of the times. Usually, however, we find more substantial causes. What was the reason companies were given monopolies in those days? It should be borne in mind that, beginning with the earliest stages of political development, different tribes and nations were in a state of antagonism, of al-

most constant warfare. The subject could not go outside of his own country without exposing himself to the danger of robbery or of death. Thus the first duty of each citizen was to protect the state or society of which he was a member. Kings asserted, as did later Louis XIV, their prerogatives, and claimed that the whole state centered in them. In a measure this was a necessity, in order that there might be such organization that the forces of the nation would readily respond for defense against attack. Whether it was a republic or a monarchy, everything was subordinate to the state. This was the conception of the ancient world, of Greece and Rome, and it existed until within a few centuries of our own time in a more or less modified form. Added to this, the state not only exercised absolute control in military and civil administration, but over all the activities of each of its citizens. It was necessary that the state acquire revenue and the sources were not readily available. Whenever any one desired a privilege, which would bring profit, it was granted on condition that a share of this profit should go to the state. The labor of the ancient world was not so willing or so alert as that of the modern. Much of it was performed by slaves. But the king was the only one who could bring to any enterprise a sufficient number of workmen to accomplish any great result. Thus in the early beginnings of large scale operations, there was almost absolute dependence upon

the state. After some degree of progress had been made, there succeeded a quasi-partnership between the state and the individual as already described.

The dependence of commerce and industry upon the state did not arise from the necessity of protection against foreign enemies alone. The establishment of domestic order and the administration of justice were necessary as well. Commercial associations or organizations could not exist without courts, except in a crude form and with much uncertainty. It was essential that rules should be established relating to contracts, and that the rights of corporate members among themselves and as between themselves and outsiders should be defined. In securing these objects, the state must exercise control. Another reason for monopoly and for the existence of a close association with the state was derived from the standpoint of the investor. Commercial enterprises involved very serious danger and were always attended by great risks. Capital was scarce and those who invested could not be induced to engage in uncertain enterprises until a monopoly was granted. One claim frequently advanced was that those who prepared the way for profitable trade might have their profits snatched from them by competitors who had not ventured to incur the original risks.

One explanation why the ordinary form of corporate organization proved unprofitable without a monopoly until within less than two hundred years,

is given by Adam Smith in his "Wealth of Nations," published in 1776. He says that the joint-stock company, a form of corporate organization, cannot without monopoly compete with the individual unless it be in a case where the business is practically one of routine or where there is such a uniformity of method as admits of little or no variation. He avers that the superior interest and vigilance of the individual will cause him to succeed in competition with the joint-stock company unless such conditions exist. There are four kinds of enterprise in which he says the corporate form of organization may succeed. These are banking, insurance, the making and maintaining of a navigable cut or canal, and the furnishing of a water supply for cities. All the other numerous processes of manufacture and commerce would, in his judgment, be conducted at a loss by the joint-stock company without a monopoly.

Mr. J. R. McCulloch, in his very valuable "Dictionary of Commerce," published in 1832, reiterates the views of Adam Smith, quotes his words and makes the same four exceptions. Even in so late an edition as that of 1850, he still expresses the belief that the joint-stock form of organization could not compete with individual management.

There was a variety of causes for the absence of joint-stock companies in manufacturing enterprises before the latter part of the eighteenth century. The principal one was that combined effort

and capital, save in commercial enterprises where the development of large scale operations was naturally earlier, had no great advantage over the individual in the so-called "Pre-machinery Age."

Defoe mentions a visit to the woolgrowing districts. He found the father and boys of the family tending the sheep, while the wife and daughters, including all who were over five years of age, were engaged in the work of spinning and weaving in the house.

In the exceedingly narrow market which existed at that time, this method of making cloth was profitable, and in fact production on a large scale could only be accomplished by bringing large numbers engaged in a particular form of manufacture in one community. Yet the large community would have no material advantage by a division of labor, and their product would be likely to overstock the market. Thus each locality or district endeavored as far as possible to furnish its own supply of clothing.

No material change occurred until early in the eighteenth century. With the introduction of the first labor-saving machine, capital became an important element in production. The relation between capital and labor as factors in manufacture was changed, and with the rapid development of machinery and improved means for transportation, an economic revolution took place. Improvements in communication were equally marked. In the

primitive method of transportation the man carried the burden on his back. Later he purchased a horse or a mule, which became an investment of capital to that extent. Capital was also expended for the construction of roads. The first ways of communication were rough by-paths, but when the importance of better roads and improved means of carriage came to be realized, highways were constructed, as in the case of the celebrated road from Vera Cruz to the City of Mexico, one of the most important in the New World. These improvements made a wider market available and led to the consolidation of manufacturing in localities possessing superior facilities. In the selection of these localities, competition played an important part. Competition also became an important factor in each locality, because cheapness of production and skill in distribution were essential to success.

These factors, the invention of machinery and improvements in transportation, caused the growth of the joint-stock company or corporation, and they also caused an era of monopoly to be succeeded by one of competition. There were, of course, other powerful factors at work. The growth of the modern corporation and of competition is in great measure contemporaneous with the growth of popular government and greater civil rights. The individual counted for more, and the king or state for less. Sovereigns began to realize that their power and the strength of the countries over which they held

sway were largely dependent upon the prosperity and wealth of their subjects. Again capital for investment was increasing. All these things combined to bring about a transition from a period of monopoly to one of competition. The formation of companies and stock jobbing assumed considerable importance in England in the later years of the seventeenth century. But the new régime did not become well established until after the middle of the eighteenth century.

Before considering the present period of combination and regulation it is desirable to briefly review the origin and forms of some of the ancient corporations and associations. They are of subordinate importance in the elucidation of this subject, and chiefly valuable because they show the universal impulse for association and co-operation. The political and religious organizations of the ancient world furnished the model for those which were commercial and industrial.

We have no satisfactory data relating to the commercial and industrial associations of Tyre. Such information would be valuable if we possessed it, for, all things considered, the trade and industry of that city present the most remarkable development in the history of commerce. Tyrean boats probably went around the Cape of Good Hope, fifteen hundred years before the Christian era. In Greece there doubtless existed partnerships and associations, but the idea of an association or cor-

poration as a distinct person or entity, separate from the individuals of which it is composed, did not, so far as we know, exist until the days of Rome.

The germ of the corporation first appears in the Roman collegia, which in many respects were similar to the guilds of mediæval England and Europe. But in the great abundance of that which has been written upon collegia and guilds, it is unfortunate that more light has not been thrown upon their origin.

The following may be ventured as a plausible explanation. It is generally believed that the ethnic form of society was the first form of association. There were first the families, then the gens or clans, and later the tribes. The principal bond which held these groups together was kinship, either real or fictitious. Early tribal relations were based on the group as a unit. Members of the group had no individuality. In time the ties of kinship became less binding by the infusion of strangers or the disintegration of the older groups by migration or war. In order to provide means of administration for the new conditions, it was necessary to form other groups, based upon locality, occupation, or other bonds of union. Solon, at Athens, and Numa, at Rome, created new divisions of society in this way. The latter is said to have established nine associations of artisans at Rome. These were the earliest collegia of which there is any mention. In

this new form of organization, as in tribal society, the individual was still but one member of his group from which he could only with difficulty detach himself.

During the early Republic, these Roman corporations became very numerous and played a highly important part in the political and social organization of that period. They were of notably diverse nature, some were public, others semi-public, and still others purely private. They had for their aim religion, politics, business, and sometimes pleasure. At a later time, certain duties were imposed upon them in the way of paying taxes or rendering service to the state. In the days of the later Republic, they were subjected to the strictest regulation by the state, because of the fear that they might become sources of sedition. About 64 B.C. the Senate passed a resolution suppressing illegal collegia. Six years later Clodius did all in his power to nullify this resolution and to increase their number. One of the reasons why the Senate had legislated against them was the suspicion that they were concerned in the conspiracy of Catiline. Julius Cæsar made use of them at election time, but later, when he had the responsibilities of a dictator, he issued a decree suppressing all illegal collegia and very much diminished their number. In the time of Augustus they were strictly controlled, and none could be formed without the imperial consent.

It is interesting to note the manner in which the collegia came to assume the form of corporate entity. The original Roman idea was that the property of the state, or of each city (municipium) was the property of no one, but this became extremely inconvenient and, after a time, the conception of the municipality as a juristic person was evolved. The municipality must have existence as a municipality, independent of its membership. So this conception of a juristic person or corporation first applied to the municipality was afterward by a ready translation applied to the collegia.

The guilds of continental Europe and England show the same general development. It cannot be said that the guilds were a derivative from the collegia, although this assertion is sometimes made. When we recognize similar institutions in different countries we are prone to make the mistake of concluding that one is derived from the other when we should ascribe the similarity to common human impulses and desires which are everywhere at work. The same fact holds true in regard to the legal conception of the corporation in England. It is sometimes said that it was derived entirely from the Roman law. No doubt in the development of the corporation law of England, there was frequent reference to the Roman civil law, and to the canon law; but the beginning of the legal view of the corporation was independent of Roman influence. If there was any extrane-

ous influence in the beginning, it was rather the Norman.

It is not necessary for our purpose to discuss in detail the many forms of corporate organization that existed during the Middle Ages. None was industrial and none commercial until after 1600. Nevertheless, the merchant and craft guilds and municipia on the one hand, and the numerous religious, educational, and eleemosynary corporations on the other, all performed important functions and constituted distinct steps in the evolution of the corporate idea.

After this rather cursory review of the development of corporate organizations from early times, let us now look to the present problems and consider what factors are causing the era of competition to be superseded by one of combination. It is evident that if the forces of competition have full sway, they will exert certain destructive influences detrimental to human welfare.

Enterprises are conducted in sharp conflict one with the other when they should either occupy separate fields or be managed in harmony. An immediate manifestation of undue competition is the forcing of profits in enterprises to a minimum. In fact, business is frequently conducted at a loss, and the rule of the "survival of the fittest" is most severe under a régime of free and unrestrained competition. The methods commonly employed to neutralize its effects in the last thirty or forty years

have been gentlemen's agreements, the formation of pools, division of territory, and agreements as to prices and the respective quantities to be sold by one company or another; then came the trust formation, under which stockholders in different concerns turned over their respective shares to a board of trustees. As might have been expected, the courts declared the trust agreement to be illegal. The ownership of stock in a corporation is not merely an indication of the property owned; it not only conveys a privilege, but it carries a responsibility as well. Thus the owner of stock cannot relieve himself of his responsibility in the management of a corporation of which he is a member and turn it over to some one else.

Next came the holding company, which is virtually a trust in a new and more effective form. Although the right of one corporation to hold stock in another had been granted in a few cases by special acts of state legislatures, this practice was first recognized in a general statute by the New Jersey Corporation Law of 1899. Contemporaneous with this latest style of organization came the formation of new companies on a larger scale, with the intention of concentrating branches of industry or commerce under one management. This movement reached its culmination about the year 1904, being checked by the adverse decision of the Supreme Court in the Northern Securities Case and the more vigorous enforcement of the Sherman

Antitrust Law under the Roosevelt administration. To what extent it will be carried in the future, can only be conjectured. Already the railways are fast combining into a few large systems, each dominating a certain territory, as is the case in England and France, while in manufacturing the latest combinations embrace not merely competing branches of an industry, but also all the primary and secondary processes of production.

An apprehension exists in the minds of many persons that the state will be overshadowed or overborne by corporations in the no distant future. In order to show that this apprehension is without foundation, it is only necessary to refer to certain well-ascertained facts. In the first place the presumption that political organization must prevail over corporate organization rests upon the greater number of its members and the fact that a corporation can exist only by authority of the state. Let us suppose for illustration that all citizens of this Republic should become financially interested in corporations. Agreement among them would, nevertheless, be impossible because of the contrariety of interests. In the first place we would have the opposing interests of the consumer and the producer. How could all these be brought into unison so as to endanger the state? The relation of the employer and employee furnishes another illustration. But, it is said, the state by collusion with the corporations may be overshadowed or over-

thrown. When we analyze this contention, it is virtually a declaration that the citizen is in collusion with himself. In some localities corporate power may be so strong that it can secure undue privileges, but when the question is clearly presented and the great mass of people understand the situation, the state that creates the corporations and can destroy them, must prevail.

The greater permanence of political institutions is another reason. Industry and commerce in their operations undergo constant changes; old methods and instruments are being discarded and new ones adopted; the location of centers of industry and commerce is constantly shifting from place to place. The principal seat of a branch of manufacture may be in Massachusetts in one decade, in Pennsylvania or Ohio in another. With each change there is necessarily some decrease in the degree of power which the corporation enjoys. In forms of government there is not the same change, and this fact adds stability to political organization which commercial organization cannot possess. In the third place, while the desire for a livelihood and for the acquisition of wealth is a factor, the effect of which upon the individual is not likely to be exaggerated, nevertheless sentiments of attachment to country, patriotism, and justice have in the long run an influence which makes them quite as potent as the desire for material advancement. There always will be some

whose motto is "Put money in thy purse," but a great multitude of others will impress upon the citizen the necessity of the protection of the state and the nobility of loyalty to it. They will say, in the language of the drama of "Wilhelm Tell,"

> "Cleave to thy fatherland; thy country dear,
> Grapple to that with thy whole heart and soul!
> Thy power is rooted deep and strongly here."

CHAPTER II

NATURE OF COMBINATIONS IN THE UNITED STATES AND ABROAD

THE tendency toward combination in the industrial world is everywhere manifest. It is not confined to any one country or to any one industry, although the particular form that it takes, the extent to which it is carried, and the policies adopted by different countries show considerable variation. In popular language the word "combination" is generally understood to mean operations on a large scale, but the two are not necessarily synonymous. A great organization may be formed directly instead of by the consolidation of smaller concerns. Still that is not the most frequent origin of large scale operations of the present day, especially in the United States. The Steel Corporation is a good example of the usual method pursued. This gigantic combination embraces a considerable number of large single corporations, such as the Carnegie Steel Company, and derives benefit from the experience and patronage of its constituent members.

There are two distinct sets of causes underlying the movement toward combination:

1. Those which are normal and responsive to those economic laws which make for cheapness or efficiency.

2. Those operating under conditions which are not normal, in which cheapness and efficiency are entirely subordinate to private gain and efforts to secure monopoly.

Among the first class are the diminished cost per unit of production, better utilization of capital, advantages in purchasing raw material and in obtaining improved mechanism. Substantial advantage can also be secured from the more perfect organization made possible in large establishments by the division of labor and the manufacture of distinct articles in separate shops. Large concerns also obtain increased profits from the manufacture of by-products, thus utilizing material which would otherwise be wasted. Smaller establishments with limited capital could not utilize this material because of an insufficient supply. Some time ago, the manager of a company proposing to construct coke ovens, gave figures showing that for $400,000 ovens could be built for producing a certain quantity of coke, while for $1,600,000 a plant could be constructed from which there would be by-products in the form of gas and sulphate of ammonia, which would much more than pay an income on the increased cost; indeed would make it possible to furnish the coke for a very small sum. The report made on the Beef Industry some years ago by the

Bureau of Corporations, even went so far as to say that without the utilization of the by-products the business would be unprofitable at the prices charged.

The economies in distribution are even greater than those possible in production. The larger the product and the greater the variety, the less the expense in delivering it to the middleman or to the consumer. Substantial economies can be secured in the cost of distribution by division of territory, thereby avoiding what are called cross-freights. For instance, under a régime of competition, a manufacturer in Chicago might ship to Philadelphia, while a rival factory in Philadelphia would be shipping to Chicago. When acting in unison this waste is done away with and orders are filled from the nearest factory. Diminished cost in freight charges is often secured by shipping considerable quantities. A large combination saves, to a great extent, the cost of advertising and the wages of salesmen. Further, it increases efficiency by abandoning inferior plants and discarding obsolete machinery. Another important advantage results from the better understanding of the market which can be gained. When there is a multitude of small establishments, the probability of overproduction is very much increased. The managers of a large concern are located, as it were, on a commanding eminence. They can more readily detect signs of slackening demand and thus adjust

the volume of the product to changing conditions.

These same factors are plainly visible in the second class of causes, but they are eclipsed by motives less beneficial to the public, for in actual experience the attainment of economy and efficiency is not the cause which has contributed most potently to the formation of combinations. The prevailing reason has been the desire to eliminate competition, to fix prices by controlling output and thereby to secure a monopoly. In the "Preliminary Report on Trusts" made by the Industrial Commission some ten years ago, it was stated that "Among the causes which led to the formation of industrial combinations, most of the witnesses were of the opinion that competition so vigorous that the profits of nearly all competing establishments were destroyed, is to be given first place."

In this desire for the elimination of competition we may detect the partiality for monopoly which has always been prominent in industry and trade. One reason for the monopolies of the Middle Ages was that those undertaking great enterprises could not otherwise make them profitable. The modern captain of industry seeks the sole occupancy of the field in the same manner as the English Trading Companies, but he must secure it by combination instead of by obtaining a grant of exclusive privilege from some sovereign.

The worst evil of existing combinations is over-

capitalization. Whenever a combination is formed, it is generally necessary to take in a considerable number of plants—good, bad, and indifferent—and allow for the value of each in the capitalization of the new concern. But that is not all. The promoter must receive very generous compensation, and it is well known that some of the largest legal fees ever received have been paid to lawyers engaged to do the legal work connected with the incorporation of new companies. As a result, combinations so organized must begin business with an inflated capital.

Furthermore the formation of a combination often partakes of the nature of a stock-jobbing operation, the aim being not to facilitate production or to diminish cost, but to afford profits to promoters and underwriters. Fraudulent promotion and stock watering were especially prominent during what is sometimes called the promoters' period, from 1899 to 1904. During these five years, combinations with an aggregate capitalization of several billions were launched. The principal motive for their formation in numerous instances was to unload upon the credulous public large quantities of worthless securities. The sudden collapse of some of these concerns, such as the Ship Building Trust and the reorganization of others, is sufficient proof that they were not formed in response to any legitimate business demand.

The tendency toward combination is not without

its limitations. Combinations do not exist in all branches of production, the most notable exception being that of agriculture. The art of farming, if it can be so called, has shown a comparatively small degree of modification. Machinery has aided in the process of sowing and reaping, but in comparison with progress in manufacturing, the advance has been slight. The work of manufacturing has been transferred from the individual member of the guild to great aggregations of individuals because of the revolution in industrial methods and the utilization of capital in obtaining more economical results. It is plain that no such progress has been made in agriculture. The small farm affords an opportunity equal in many respects to that of the large farm. The more minute attention of the individual farmer is one important advantage. Thus in the history of consolidations we may eliminate agricultural production. However, in carrying agricultural products to the market and in preserving them for use, great improvements have been made by the use of refrigerator cars and cold-storage plants. But this pertains to transportation and to the middleman rather than to the original producer.

Next to agricultural production, the two branches least affected by the tendency toward combination are banking and the mercantile business. Especially in the latter the importance of the personal element, the spirit of accommodation manifested by

the dealer, his skill in selecting goods and displaying them for sale, all influence the choice of many buyers in making their purchases. Nevertheless, in view of the increasing cost of placing articles in the hands of consumers, consolidation on a large scale is likely to develop in the mercantile business, both wholesale and retail. While it must not be ignored that there has been a considerable measure of consolidation in the banking business, accomplished in some cases by the union of separate banks under one management, but more often through the connection of the same directors with numerous financial institutions, the personal element, nevertheless, assumes very great importance. The personal confidence reposed in the managers has very much to do with the patronage of a banking institution. It is true that in other countries the tendency has been toward the establishment of great central institutions, such as the Bank of France, which has branches all over the French Republic, and other institutions of Paris, which have very widely scattered branches, some of them in other countries. In England, also, most of the banking business is carried on by banks which have a central institution and numerous branches. But the sentiment in our own country has thus far been entirely against the branch banking system.

Except for the Sherman Law, which makes agreements or contracts in restraint of trade illegal, the Federal Government has not sought to regulate in-

dustrial corporations. A great variety of state laws exists for their regulation, some good and some bad. These will be described in more detail in the following chapter. Since 1887, the Federal Government has undertaken to regulate railway corporations with a considerable degree of success. Legislation, however, has been faulty in not recognizing that the railroad corporation is a natural monopoly which for this reason should be dealt with in a manner different from industrial concerns. The Interstate Commerce Act prohibited pooling, and attempted to rely upon competition as a regulating factor, a policy which experience has shown to be entirely erroneous.

The railway differs from other forms of enterprise in the enormous amount of capital required, at least for a great railway system, and in its necessary dependence upon the state. It must have important privileges and powers, such as the right of eminent domain and exceptional protection by the police power. Furthermore, the property of a railroad is of such a nature that when once located, it cannot be transferred to another place.

The history of improved transportation in the United States by railways, canals, and roads, displays a striking resemblance to the development of great industrial and commercial enterprises from their early beginnings, as portrayed in the preceding chapter. At first the Government or the states undertook the construction of canals or im-

portant roads. The Cumberland Road, the Erie Canal, commenced in 1817, and the canals of Pennsylvania and Ohio are illustrations. When construction was undertaken by the several states, in some instances assistance was rendered by the Government in the form of land grants. This policy continued until about the year 1837, when a second period commenced, during which these great enterprises were prosecuted by private companies, though they still remained closely associated with the state. In that era large land grants were given by Congress, and very considerable amounts were voted by communities and states in the form of money, bonds, or subventions. In return the railroads receiving land grants agreed to carry free the troops and mails of the United States. In the case of the Illinois Central Railroad a contract was entered into that a percentage of the gross income should be paid to the State of Illinois.

In this second period there was a quasi-partnership with the state, while in the third period, beginning about the year 1870, the independent action of private enterprise in the building of railroads was the rule. In the first and second periods, canals and railroads enjoyed a practical monopoly, because localities were often insufficiently furnished with transportation facilities and the larger share of their business suffered no interference from competition. Thereafter lines were constructed in competition with those already in ex-

istence, as illustrated by the West Shore which paralleled the New York Central and Hudson River Railroad from New York to Buffalo, and the New York, Chicago and St. Louis, which paralleled the Lake Shore and Michigan Southern from Buffalo to Chicago. In this third period also, the great trunk lines were enlarging their systems by absorbing or constructing branch and connecting lines to all important terminal points, including those already reached by their rivals. This was another factor in the inauguration of an era of competition. Divers railway wars followed, many of them of a disastrous nature, until agreements and combinations began to appear. The desirability of avoiding competition and for concert of action is a distinctive feature of this later development in railway operation and management. Federal regulation, as by the Interstate Commerce Law, was actuated principally by the fear of monopolistic control of railroads.

Competition in railway management and operation cannot have the same salutary effect as in other lines of business. Where competition naturally exists, an individual desiring some article, can utilize the fact that two or more are engaged in furnishing what he desires, by asking them to bid against each other, or from the standpoint of the competing sellers, it is expected that one will fix a lower price and give more favorable terms than his competitor. But in the case of railways,

legislation and popular opinion have forced them to give absolutely equal terms to every shipper. It is obligatory that the railroad should treat all alike.

The policy of this country in regard to railway competition has caused many of the evils of combination of which we most complain. This fact is very clearly stated in the Report of the Industrial Commission, in these words: "Some of the strongest forces of combination have been fostered by laws intended to prevent them." Very strict laws have been enacted, compelling railroads to conduct their business on a competitive basis. Pools and agreements have been forbidden, and the railroads have been forced to enter the competitive field. Under such circumstances they naturally seek the patronage of the largest shippers, and in order to obtain it offer special favors. In the days when rebates were prevalent, it was almost always the larger companies who received them and were thus able to drive their competitors out of business. As an alternative, smaller concerns were forced into combinations, so that they might live. Thus the same law-making power, which demanded that there should be no combinations, actually made combination necessary by attempting to apply to a natural monopoly an inapplicable rule. Regulation of the strictest kind is, of course, necessary, but it is simply inevitable that competing railroads will come to some sort of an understanding.

Mr. Gladstone, more than sixty years ago, recog-

nized the fundamental principles relating to railway competition. When the question of granting a franchise to a competing railway line to the northwest of London was under discussion in the House of Commons, he suggested that capital was quite abundant, and there would be numerous requests of this kind, but that he had had enough experience with railways to make him feel assured that it would not do to rely upon competition between rival lines or upon competition cutting down prices to the same extent as in other matters. The vastness of the capital required, and the circumstances of the parties interested, made arrangements between rival lines easy of accomplishment. Conditions existing in other lines of business would not result in competition between railroads, and whether existing at first or not, later it would cease. He quoted a remark by Mr. Fox as applicable to rival railroads—"*Breves inimicitiæ amicitiæ sempiternæ.*" (Quarrels are brief, friendships eternal.)

In view of the exceptional nature of railroad property, all legislation preventing agreements between different companies, even legislation forbidding pools, such as was contained in the Interstate Commerce Act of 1887, must be regarded as a retrograde step and as tending to disarrange the natural development of industry and commerce. We must recognize the peculiar nature of railway property, the different functions it has to perform, and treat

it accordingly. If we do not, the law against agreements will be evaded or disastrous results will accrue from their prohibition.

Combination has been carried farther in the United States than elsewhere. Germany probably comes next in this phase of development, then England, and fourthly France. The "holding company" seems to have gained little foothold in any of these countries except England, though in some instances there have been combinations by amalgamation.

The simplest form of combination in Germany is that under which there is a mere settlement of the terms upon which business shall be done. Agreements as to terms of credit granted are an illustration of such a settlement. If it had been the custom of some dealers to give sixty days, others ninety, and some one hundred and twenty, they come together and agree upon a uniform time in which payment is to be made. They sometimes agree upon the charges for packing and delivery, and all those incidental features which assume considerable importance in the sale of goods.

The second form is the price association, the aim of which is to regulate the price at which actual sale is made, or the article disposed of to the consumer. These arrangements are generally local, though the locality may cover a wide area and embrace a number of branches of trade. They are resorted to by persons engaged in producing and

selling kindred commodities, and sometimes include both manufacturers and wholesalers, and occasionally wholesalers and retailers. The usual agreement consists in fixing a minimum retail price below which goods cannot be sold.

The third form is a limitation of the output. Oftentimes the cutting of prices below the cost level is due to overproduction. Under this form a sale may be made at any price the owner pleases, but the output must be limited to a certain amount. This arrangement, it will be observed, aims to secure the same result as the price agreement, but in an entirely different way.

The highest type of industrial organization in Germany is known as the cartel, which fixes both price and output. A cartel is in reality a highly developed form of pool in which the several concerns desiring to eliminate competition organize a separate corporation which they control and which acts as a selling bureau for them. This bureau or syndicate, as it is sometimes called, fixes prices and determines the output of each company and usually manages the whole business of selling. In a pure cartel the producers organizing the bureau are the exclusive owners of the stock. In some others outside interests, such as banking-houses, may be allowed to own some of the stock and thus have a voice in the management. As a rule cartel shares are not transferable and never receive any dividends. They simply represent voting power.

The respective concerns represented in the syndicate or cartel receive all the earnings.

The operation of the cartel is very simple. The constituent members agree upon a price for their products barely covering the cost of production. Then they turn over their output to the syndicate at a price usually somewhat above the base or no-profit price. The syndicate sells the products of all to the consumer for whatever price can be obtained in competition with others in the market, its aim of course being not to sell below the price at which they were received. Control of so large a supply enables it to maintain prices. Whatever profits or losses result are shared by the concerns represented in the organization.

The participation of the constituent members of a cartel in the total amount sold is based upon their productive capacity under competitive conditions. The total output agreed upon for a given length of time is parceled out upon this basis, and penalties are imposed for exceeding these specified amounts. All orders pass through the selling bureau and are allotted by it to the respective members to be filled by them.

The cartel form of organization could not exist in the United States, because the agreements fixing price and limiting output would be illegal on the ground that they are in restraint of trade. In Germany the selling bureau is a separate corporation and has a legal standing in court. The agree-

ments made between it and the constituent concerns and the penalties prescribed for violations of these agreements are enforceable under the law.

The stability in prices brought about by these agreements is looked upon as a public benefit and accordingly little hostility exists against them.

The cartel has some advantages belonging to the holding company, such as the continued existence and individuality of the constituent concerns, but it is only a temporary organization, for the agreements, unless renewed from time to time, may expire after a few years and the cartel be dissolved. Furthermore, the cartel cannot exercise as complete a control over production as the holding company, because all the constituent concerns are interested in enlarging their capacity and obtaining a larger allotment of the total output. The holding company on the other hand can shut down or dismantle certain factories if necessary in order to limit production while running the others to the fullest capacity, thus effecting greater economy. The greatest advantage of the cartel is that it avoids the obloquy visited upon large combinations. It has no capitalization and pays no dividend, although it figures prominently in the public eye. The constituent companies, declaring their respective dividends, some high and some low, are sheltered by the syndicate and enjoy the profits.

It is to be noted that neither in Germany nor in France is the rule in regard to contracts in re-

straint of trade enforced as in England or in this country.[1]

In France the movement toward combination is much less pronounced than in other leading countries. This is due to the fact that most of her industries are not so highly developed and have not yet felt the pressure of foreign competition to the extent that those in other countries have. Different conditions exist in France from those prevailing in the United States, Germany, and England. There is not the same degree of aggressiveness in obtaining trade. The exports of that country consist largely of articles of fashion and of special products which obtain a ready sale because of excellence or novelty. Another reason is that the Criminal Code contains two clauses which prohibit fraudulent or monopolistic attempts to control the market. Section 419 of this code forbids issuing false statements to affect prices, and makes illegal any association which causes a rise or fall in the

[1] In a recent article regarding German bookstores Professor Munsterberg argued that conditions there were much better for the selection of books, because in each town the bookstores kept a large assortment from which the prospective reader could choose The main reason for this in his opinion was the fact that a binding agreement as to price existed between all dealers This enabled the small retailer to compete with the department stores on favorable terms and maintain an assortment of books useful to the community. These agreements as to the price of books were considered to be perfectly legal in contrast with the view that our courts have taken under similar circumstances.

price of foodstuffs or of public securities. Section 420 provides severer penalties for the manipulation of prices of certain necessaries of life, such as grain, flour, bread, and wine. This law was passed in 1810, and about 1836 it was enforced with such strictness as to forbid the consolidation of two companies which operated stage-coach lines. It was held that the law was broad enough to make criminal such a consolidation. Later decisions have mitigated somewhat the harshness of the rule thus laid down.

A law pointing in the opposite direction was passed some twenty-five years ago and allowed professional and other associations to be formed for mutual benefit. Merchants and manufacturers have of late taken advantage of this law. While the ostensible purpose of forming these associations is to study the conditions of the trade and to promote exports, there is no doubt that in actual operation they exercise a very important, if not a controlling, influence upon prices. Amalgamations have occurred in some instances in France, but the central selling bureau, which fixes the allotments of the constituent members and acts as the agent for all in selling their goods is more common, although by no means carried as far as in Germany.

Of Great Britain it may be said: (1) The same general means and methods of combination are employed as in the United States. (2) These methods are not resorted to in the same degree of

magnitude as here. (3) The law is not as strict in regard to unlawful combinations. Careful attention is given to the question in each specific case, whether a combination is deleterious to the public welfare or not. For example, some time ago a suit was brought by a shipper of tea from China against an association of steamship owners who required as a condition for carrying his tea that he would ship by no other line, and promised that if he complied with this requirement a rebate would be allowed to him. He brought suit against this association and judgment was rendered against him.[1]

The question of the relative scope of great combinations in different countries is further very much affected by the particular laws or regulations relating to corporations. It seems to be the opinion of many that the laws of a country relating to business or to corporations come into existence full grown, from the brain of a theorist, or that they are drawn with a view to expressing in legal terms universal principles of trade. The real fact is that they are always modified by circumstances of the time, by physical conditions, by the status of a country, whether old or new, the prosperity of its people, the form of its government and political ideas concerning the relations of the government to the people. All these varied influences have to be taken into account.

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[1] Mogul S S. Co. *v.* McGregor, (1892) A. C., 25.

Certain important influences are to be noted in Germany. One is the existence of a paternal form of government with compulsory military service and government ownership of railroads. On the other hand, she is endeavoring to solve the problem of material development, probably with more skill and ability than any other government in the world, and is intelligently seeking to enable her citizens to make the most of the resources of the country, and to attain the greatest degree of prosperity possible with the opportunities afforded. The same supervision of government over private affairs, which prevailed in earlier times, still prevails in considerable degree in Germany. The natural outgrowth is legislation embodying very strict regulations of corporations. Beginning with the formation of a business or commercial company, the law provides that the purpose of incorporating must be clearly shown. If the corporation is formed to take over tangible property, that property must be carefully appraised. It cannot commence to do business until the stock is subscribed and 25 per cent. paid in. When a company is formed, there is the same *modus operandi* as in an application to a court. The government is represented, and there is the closest scrutiny of the proposed organization, its object, its management, and the property that belongs to it. The articles of incorporation among other things must state for what considerations the shares of the company are issued and, if not for

cash, then the prices paid for property acquired and the amounts paid for services rendered in connection with the promotion of the company.

Strict supervision is maintained to make certain that the property of the corporation is not dissipated, in order that the stockholders may not lose by reason of waste or fraud. Dividends can only be paid out of profits, and at least one-twentieth of the net profit of each year must go into a reserve fund, until this fund equals one-tenth of the capital stock. Fullest publicity is required by the German law. All reports are open to public inspection. Stockholders can secure an examination of the books, if they so desire, and any misrepresentation on the part of officers with the intent to deceive is a criminal offense, punishable by fine and imprisonment.

In England the laws regarding the organization of a corporation are much less strict than in Germany. It is not necessary that all the stock be subscribed or paid in. There is not the same requirement for maintaining a parity between the value of the property and the stock subscriptions, but there must be the fullest publicity in these particulars. A prospectus displaying the affairs of the company in full, must be issued and filed where the public can have access to it. Promoters and directors are held strictly liable for the truthfulness of all statements concerning the business. In preparing the annual statements after the commence-

ment of operations, it is customary to engage professional accountants of high standing to examine the books and report upon the condition of the company.

In France, as in England, publicity and strict liability of all officers are the main features of their corporation laws. The amount of capitalization is not limited, but since 1893 the par value of shares has been determined by law. In the case of limited liability companies, the stockholders can appoint auditors to examine the books and transactions of the company, and they may themselves have access to certain of the records such as the balance sheet and list of stockholders fifteen days before the annual meeting.

Now what is the situation in the United States? It is probable that in our own country the privileges of the corporation are greater than in any country in the world. More serious excesses can be perpetrated and more serious frauds accomplished than anywhere else. There is a wide latitude in the powers which corporations may exercise. Of course, the laws of the respective states differ widely, but the general tendency is toward laxity in governmental control and latitude in the management by officers of corporations. What is the essential reason for this condition? It is not due to the perversity of our people, but to causes plainly discernible. We must recognize that here in the United States, there is the greatest oppor-

tunity for the ready acquisition of wealth on a large scale that has ever existed. We have a vast undeveloped country, between the lesser and the greater ocean, abounding in the treasures of the farm, the forest, and the mine, far in advance of all other countries in the mining of copper, well to the fore in silver and in gold, mining more coal than any other nation, and having the greatest variety of products. The humblest American shares the general desire to acquire wealth just as rapidly as possible. Again, he wishes the country to be developed, because he expects to obtain a part of the wealth so created.

Thus corporations have been allowed a free hand because it was believed they were the readiest agency for the rapid development of these great resources. Such is the real reason for the extensive privileges given to these organizations. The idea has prevailed that no one should stand in the way of any means for increasing the wealth of the country, and that a corporation could develop and make available its resources, where individuals single-handed would fail.

That the time has come when regulation is necessary in a larger degree than before, I think all who have carefully considered this subject must admit. Momentous results will undoubtedly follow the recent decisions of the Supreme Court in the Trust cases, but the disposition of the people upon the subject will be even more important. That will

determine whether the great aggregations of private capital will be tolerated or destroyed. It will determine also whether there will be a growing tendency for the state or some political body to take over these organizations as soon as they acquire a controlling position in any industry. No one can, with any confidence, predict what the outcome will be, but powerful forces—social, political, and economic—all point toward combination, and these forces have never been so potent as in the last twenty years. Even though we disregard the influence of the promoter and the necessity of combination to avoid competition, nevertheless, economic tendencies are powerfully at work, which forecast future operations in industry and commerce on an even larger scale.

CHAPTER III

THE REGULATION OF CORPORATIONS

THE prominence of the corporation in our American business life is becoming more and more manifest each year. This fact brings into clearer light the necessity for more comprehensive and judicious regulation of corporate activities in the interest of the public. Heretofore two factors have made such regulation difficult of enactment. One, as already stated, has been the disposition of the people to give a free hand and generous franchises to corporate managers, under the impression that such a policy would most rapidly promote the development of the country's resources and thereby greatly increase individual wealth. A second reason is found in the necessity for higher profits in many enterprises than are customary in more settled countries. Business ventures are more varied and less certain of profitable return, also rates of interest and wages of labor are higher. Numerous enterprises have been undertaken here which have proved exceedingly successful as well as beneficial to the public, the capital for which could never have been enlisted by the inducement of profits of 5 or 6 per cent.

It is interesting to note that in England a number of franchises to public service corporations have been granted on the condition that a certain dividend might be paid when a certain price was charged the public. For example, so long as a gas company in London continues to charge two shillings and six pence per thousand cubic feet, a dividend of 4 per cent. may be paid. If at any time the price of gas is lowered to the consumer, the dividend may be raised, and conversely, if the price is raised, the rate of dividend must go down. This makes the interest of the corporation and the public one; for if the public gains a benefit in the way of lower prices, the corporation may reap a benefit in the way of higher dividends. A franchise providing that if the price be lowered the dividend may be raised has recently been granted in Massachusetts, but conditions are not yet ripe in our country for the application of such a principle on any large scale; there is not that abundance of capital and not that assured success of enterprise which makes such arrangements possible. The gas consumption in London can be computed with exceptional accuracy, also the cost of coke and other expenses of manufacture, and thus the profits can be ascertained with reasonable certainty. There have been instances in this country in the case of public service corporations, such as street railway companies, where, when the franchises were about to expire, an adjustment of a somewhat similar nature

has been made, whereby it was provided that the franchise would be extended for twenty or twenty-five years, or whatever the term might be, provided the stock of the corporation, as determined by an appraised valuation, should not pay more than 6 per cent. Such an arrangement is now in force in the city of Cleveland. The street railway company starts with a charge of three cents for a fare, and one cent for a transfer, with a provision that this rate may be raised provided the corporation cannot pay 6 per cent. on that basis. If, on the other hand, a larger return than 6 per cent. is obtained, the fare is to be reduced, the first item of reduction being the one cent for transfers.[1]

Another obstacle to regulation in the United States is the confusion and competition caused by our system of government, under which forty-six states and two territories grant the privilege of incorporation, under widely different statutory provisions. In many cases the whole or greater part of a corporation's business is carried on, not in the states where the franchise is granted, but in other states of the Union. The results of this are inevitable. Different states vie with each other to influence prospective companies to take out their letters of incorporation from them. In this competition the tendency is to grant more and more

[1] In accordance with this arrangement, the one cent charge for transfers is now being refunded when transfers are presented.

liberal franchises. It is easy to predict what persons desiring to secure corporate powers will do. If they cannot obtain the desired privileges in Pennsylvania, they will seek to obtain them across the Delaware, or in some other state where even greater advantages are offered.

In a little pamphlet entitled "The Advantages of Incorporation," Mr. Frank A. North says, "The laws of New York, as do those of Massachusetts, require measures which are very desirable from the standpoint of the creditor or assessor, but are not relished by the stockholder." An official of the Province of Quebec, thus expressed himself in the *New York Tribune:* "In case of the development of drastic antitrust legislation in the United States, to go to Quebec will be perhaps the only solution for many of the large industrial combinations in the United States." A prominent Boston newspaper a few years ago contained the following advertisement: "*This Beats New Jersey*—Charters procured under South Dakota laws for a few dollars." Now it is evident that this competition between states, and the complications which are caused by it, is one of the very worst features of the situation. In this connection it will be instructive to survey briefly the principal regulations of our state laws governing corporations.

The first class of regulations pertains to the manner of incorporation. Three different methods have been employed. The one formerly most in

use was to pass a special act of the legislature incorporating the prospective company, and defining its privileges. It was discovered that this course led to log-rolling and favoritism, and interposed unnecessary obstacles, so that it was gradually dropped and now is but seldom employed. The second method, now most commonly found on the statute books of the states, is by a general law, under which a certain number of persons, usually not less than five, may file articles of incorporation, giving the name, the object, and the capital stock. Under this plan there are notable differences in the requirements of the various states, especially in the incorporation of railways. For instance, one state provides that a railway company may incorporate by filing a statement giving the following data: (1) The names of the incorporators, a majority of whom shall be residents of the state; (2) the name of the corporation, which shall begin with the word "The" and end with the word "Company"; (3) the approximate location of the railway or its projected route and the proposed capital stock. Five men, under such a rule, could file articles with the proper official, giving the name of their corporation, the proposed capitalization, which in some states is a matter of indifference, and demand the privilege of eminent domain, that is, the right to condemn property.

In other states the statutes provide that the application of the proposed company must be re-

ferred to a board of engineers, or other officers, who shall first pass upon the necessity and desirability of such a railway. The extent to which the building of railways has been restricted, is well illustrated by the English law, under which diagrams must be filed, showing the exact route—although some variation is permitted—just what property will be taken, the width of the right of way, and a detailed statement of various other conditions. A special bill must be introduced in Parliament. In the meantime any one interested can object. This illustrates the wide extremes in the giving of privileges for building railways and much the same variety of regulations appears in organizing the business of other companies.

A third method of incorporation requires application to a court and a statement of the reason for the existence of the proposed corporation. Only one state in the Union, that of Georgia, now employs this method. It resembles closely the German practice under which application must be made to a tribunal of commerce, and all the facts made known regarding the proposed capital, as well as the work to be done by the corporation, and the objects to be attained.

The next class of regulations relates to stock subscriptions and the conduct of incorporators and promoters. Here again there are three methods in vogue. The first is that under which the incorporators are the judges of the value of the property

to be conveyed to the corporation in payment for stock, the state having no responsibility therein, except to enforce liability for fraudulent action. This is the more generally accepted theory in this country. So limited a regulation renders it difficult to prevent investment in shares based upon fictitious values, and the opportunities for fraudulent practices are unlimited.

The second theory or plan provides that the issuance of stock shall be controlled and limited by the state. This is the policy adopted in Germany. It rests upon the idea that the state in granting franchises has certain responsibilities, and must therefore prevent the sale of shares to the investor at inflated values. In hardly any other country is that rule enforced with the same strictness as in Germany, though there is decided progress elsewhere toward requiring the full amount of the capital stock to be paid in.

The third theory is that incorporators may capitalize at any amount they desire, provided no stock shall be issued until a statement is prepared, showing the amount of stock to be issued, and the conditions under which it is to be purchased by investors. On this theory stockholders deal with the corporation at their own risk, the state guaranteeing the ready procurement of reliable information. The second method has been styled one of paternalism, and the third one of publicity.

State laws regarding the capitalization of cor-

porations differ widely. In Iowa all companies proposing to issue stock for money must report plans to the executive council of the state for approval. In Massachusetts the issuance of stock must subsequently be approved by the commissioner of corporations, and a certificate with his indorsement thereon must be filed with the Secretary of the Commonwealth. In Montana stock may be issued for the consideration of money, labor, services, or property. In the case of mines any arbitrary value may be placed upon the property, so as to make the stock issued therefor fully paid, regardless of its actual value. In Utah the incorporators must describe the property that is taken in payment for stock, and certify that it is reasonably worth in cash the amount for which it is to be accepted by the corporation.

Another class of regulations pertains to increase of capitalization after the company begins to do business. About the same degree of laxity and indifference is manifested in this regard as in the original issue of stock, so that here again there is a most dangerous opportunity for fraud.

In many cases the methods employed for the increase of capitalization are identical with those adopted for original issues of stock, as for example payment in services or in property. On the one hand there is a restraining influence upon the creation of fictitious stock due to the desire of existing stockholders to prevent the depreciation of their

holdings, though this factor is sometimes rendered ineffective by the fraudulent action of the owners of a controlling interest in the corporation. On the other hand inflated capitalization is made easy by the readiness with which imaginary or anticipated profits of a going concern may be made the basis for increasing the capital under the guise of a stock dividend.

Another regulation which should be considered in this connection relates to the payment of dividends.

A greater degree of strictness has been observed in this regard than in the original issuance of stock or in the increase of capitalization after organization. In Colorado, no dividend can be declared when the corporation is insolvent or when it would diminish the capital stock, and directors and officers become personally liable for debts of the corporation then existing or afterward incurred. Thus no dividends can be paid except from net profits. In Florida, if the directors knowingly declare a dividend when the company is insolvent, they are liable. Idaho, Connecticut, and Maine have similar laws. In a majority of the states, if a director votes against a dividend declared in violation of the law, he may protect himself from liability by causing his vote to be entered on the minutes. Some states require him to file his objection with a county officer.

The powers granted to corporations in many states are manifestly too broad. The earlier idea

was to restrict the corporation to a particular branch of business. Some later charters grant them the right to engage in almost every branch of business, such as manufacturing, building, construction of railroads, banking, maintenance of retail stores, in which is included so-called company stores for the sale of articles to employees. The general tendency to broad powers is hazardous, in the first place from the standpoint of the enterprise itself. It has been regarded as unwise to give the same bank the right to act as a trust company, to receive long time deposits and lend money on mortgages, and to conduct a commercial banking business, all in one. Whenever there is imposed upon the same manager or board of directors a multiplicity of duties, the danger always exists that they will not be performed properly. Furthermore the corporation may fail because of the diversity of its activities. It also gives to a large concern an exceptional hold upon some branch of business and sometimes aids it to become a monopoly.

State laws also show a very wide variety of regulations regarding publicity, which may be viewed from two or three standpoints: (1) From the standpoint of the stockholders, (2) from that of the creditor, and (3) from that of the public at large. The interests of the stockholder and creditor are usually identical. The subject which has received more attention from legislatures and courts than any other, is the opportunity of minority stock-

holders to inspect the books and statements. By the common law, this right of inspection belonged to the minority stockholder, though there were decisions to the effect that it must be exercised for a reasonable purpose. There have been numerous statutes on this subject, and quite a number of divergent decisions in the courts of the United States, but the general tendency has been to give to the stockholder this right in ample measure. It is alleged, and no doubt there are illustrations to show, that in some instances a man has bought a single share of stock in a corporation and then has presented himself to inspect its books for the purpose of securing information with which to injure the business or aid a competitor. This, however, should be regarded as an exceptional case, not affecting the general rules to be adopted.

The main argument for publicity is that the stockholder, the creditor, and the public should know what the corporation is doing. The stockholder and creditor should know whether its business is profitable or not, whether assets are being wasted, or whether they are being conserved. The public should know whether it is exceeding its powers, or earning inordinate profits. On the other hand, it is alleged with unusual earnestness, especially by those in the smaller corporations, that while publicity for the benefit of the stockholder and creditor is not open to objection, inspection by the public at large does more harm than good, because

it enables persons to learn where generous profits are being made and to enter into competition. As an illustration, the Payne-Aldrich Tariff Bill imposes a tax upon the net earnings of corporations. The most vigorous objection to this bill was not to the amount of the tax. Many corporate managers said, "We can stand that, but we do not wish to have our business known to the public," and the matter was adjusted so that the returns are filed with the Commissioner of Internal Revenue, and are open for inspection only to government officials, to enable them to ascertain the amount of the tax, and incidentally to determine the good faith of the persons making the report.

The manifest tendency, however, is toward greater publicity, and it should be borne in mind that if a corporation is receiving abnormal profits, it is but fair to the public that this should be known. If profits are due to unusual ability, to care and skill, that is one thing; if they are due to the possession of monopoly privileges, or to oppression and exaction, that is another. In any event it would seem that the public is entitled to know whether corporations are being conducted in accordance with the requirements of law. This is certainly true in the case of the great corporations carrying on business on a large scale and coming in close touch with the needs of the people in the production of the necessaries of life. When the régime of publicity was introduced in Germany in 1884, fear was ex-

pressed that the business of corporations would be destroyed and their stockholders ruined if the details of their earnings and general condition were made public. But time has proven that these grave apprehensions were groundless.

The recommendations of the Industrial Commission regarding publicity are worthy of mention at this point. The first two relate to the requirements respecting promoters. They would require promoters to furnish investors with full details as to conditions under which stock is issued, and would hold them liable for damages where the prospectus failed to make full declarations. They recommend that the names of the directors and officers be furnished any investor desiring them. So much refers to formation. As regards management they would require: (a) reasonably detailed financial reports to stockholders at least once a year, verified by an auditor, (b) information to the stockholders of the business condition, by granting proper access to the records of directors' meetings, (c) a list of members, their addresses and holdings, for the use of members before the annual meeting. A number of state statutes are in accord with this recommendation. The Industrial Commission would also compel the large corporations, the so-called trusts, to file a financial report in reasonable detail, issued under the inspection of the government, and showing assets and liabilities, with profit and loss. This report is intended for the public at large.

In the case of ordinary corporations, the Commission would only require that a reasonably detailed report shall be issued to stockholders, thus making a distinction between smaller companies and the trusts.

The general trend both of legislation and corporate management is decidedly in the direction of promoting a greater degree of publicity. It is a very common rule that an annual statement must be made at the meetings of the stockholders, and frequently it must be examined by the officers and also by supervisors, or by certified accountants, as in Great Britain, or by a committee, as in some of the states. But improvement in the management of corporations must in large degree depend upon higher standards of business morality. Reform of corporations cannot be fully accomplished by the mere enactment of statutes to prevent fraud and dishonesty. There must be a more general observance of honesty and fair dealing. The exactions which have been perpetrated, and the unfair advantages gained, are largely the result of the commercial ideals of the time. Where success is worshiped, even those possessing the highest moral standards submit with nonchalance to the disregard of law and common honesty, as if they thought the guilty ones had developed the highest type of acumen and ingenuity. Complete reform will come, not with the adoption of more perfect legislation, but when the general public, the average citizen.

realizes that the possession of limited means is to be preferred to wealth, unless obtained honestly.

It must be clear to any one who has given this subject thorough examination that corporations have outgrown state boundaries. The spectacle of one state in the Union granting extensive powers to corporations to do business in all the other states, and with foreign countries, is manifestly incongruous. In their rivalry to attract as many corporations as possible for the sake of revenue, some states will yield to the insistent demands of those interested in securing favorable franchises. Powerful corporations can also influence state legislatures more easily than they could the administrative branches of the Federal Government or the Federal Legislature.

Several plans have been suggested to overcome this inadequacy of state control. The first is to continue the present dual arrangement, as it may be called, between the general government and the states. The second is to transfer to the Federal Government the exclusive control of corporations engaged in interstate commerce, so far as it can be given. Of course, the only power the government has in this regard is derived from the clause authorizing the regulation of commerce between the states, with the Indian tribes and with foreign nations. The government has no power to enforce criminal law, except in punishment of offences against its own laws, but it does have the right ab-

solutely to control commerce between the states, and as was stated by Justice Bradley in a decision,[1] "As regards commerce between the states the whole Union is as one country. There exists the right to regulate, the right to control, and the right to control the agents and instrumentalities of commerce."

Public welfare would not be benefited by taking away these powers from the Federal Government, and conferring them upon the respective states, and there is doubt whether such a transfer of these powers could be made. But, be that as it may, it would not be desirable, not alone on account of the inefficiency of state governments, which has been very much in evidence, but because of the complications which would result from giving to forty-six or forty-eight different units the control of that which is becoming each year more and more one great united field of activity. The states of this Union are as near together to-day as the counties were in the time of Thomas Jefferson, and the time when our Constitution was formed. This is due to the modern means of communication, and the ease and rapidity with which we pass from state to state.

Three general plans of federal control have been proposed: Federal licensing, voluntary federal incorporation, and compulsory federal incorporation. The first two plans merit serious consideration,

[1] See also 9 Wheaton, 196, and 32 Federal Reporter, p. 17.

but the plan of compelling all companies engaged in interstate trade to incorporate with the Federal Government, is much too revolutionary to meet with general approbation at this time. Even the changes wrought by either of the other two plans are so great as to arouse strenuous opposition. But there should be no cause for alarm in this extension of the powers of the central government, for even if interstate business is to be taken under federal control, that step does not mean that we are to wipe out state lines or do away with the separate activities of the states. It merely means that inasmuch as commerce is fast becoming such a nation-wide affair, control of that field of activity should be taken over by the Federal Government.

The complaint that the government is assuming too much power cannot at least consistently be made by those citizens of the respective states, counties, and cities who continually call upon the Federal Government to do what they ought to do themselves. If we assume the regulation of the railways that run from Illinois to Texas, or from Pennsylvania to the Gulf, that does not mean that minor matters inside the states are to be taken over by the central government. It does not mean the drainage of lands in Florida, or the purchase of forest reserves in New Hampshire, but only that the central authority must increase its powers so far as new conditions may demand. Such a condition is presented by this great prob-

lem of commerce which knows no state lines or boundaries, and whose operations extend throughout the whole country.

In choosing between the two plans of federal licensing or federal incorporation the question of practical application assumes special importance.

The former in a general way would prohibit all corporations from engaging in interstate business unless they obtained a license from the Federal Government. As a condition of issuing these licenses, certain regulations would be imposed with a view to correcting existing evils. Under the latter or federal incorporation plan, a company would receive its charter containing the desired regulations directly from the central government. Accordingly the latter avoids the confusion and uncertainty arising from conflict between the federal and state authorities which would inevitably occur, under the license plan. The attempt of a corporation retaining a state charter and amenable to state laws to comply with the conflicting requirements of a federal license would be futile and would inevitably result in endless legal difficulties. Suppose the federal license prohibited the interholding of shares or some of the other privileges which a New Jersey charter permits, what is the corporation to do? In brief, under a licensing system either the present objectionable features which appear in state regulations must be retained, at least in part, or they must be superseded by uni-

form regulations under national control. In the former case the licensing system would be ineffective. In the latter, there would be so slight a distinction between the results attained by licensing and national incorporation that it would be quite as well to adopt the incorporation plan.

All difficulties of a practical nature would be obviated by the federal incorporation plan. Corporations having federal charters would be responsible to the rules and regulations of but one authority. Of course, some minor difficulties would arise such as the necessity for abolishing franchise taxes and the resulting loss of revenue to the states, but the advantages to be gained by having all companies with federal charters subject only to one uniform federal law rather than to the diverse and conflicting laws of forty-six states cannot be minimized. The adoption of this plan will permit corporations to do business in any state without injury to the rights of other states and without injury to the rights of any individual.

The first application of the rule of national incorporation would naturally be to interstate railways, and next to the great industrial corporations, whether engaged in manufacturing or trade, whose transactions extend through many states. There are very palpable reasons of an exceptional nature why a railway extending through five or six different states should be incorporated under national law. It is an agency of interstate commerce

over which Congress has the power of regulation, and may exercise the sole power of regulation if it so desires. Inequality is sure to arise through unequal taxation or unequal rates in the different states. One state or city can claim a privilege for itself which is an injustice to all the rest.[1] Suppose a railroad runs from Washington to New Orleans, and two or three states on the way force down the local rates—that is the intrastate rates —to a figure that would be confiscatory if applied on the whole road. The result can readily be seen. If there is a non-remunerative charge in one state for services rendered, the railroad must recoup in other states, so that it is impossible to consider it as subject to the control of any one state. It belongs to them all. Doubt has been expressed whether by any plan of national incorporation you can do away with the right of a state to regulate rates or exercise police powers within its own borders. However, a decision has recently been rendered in Minnesota, which seems to go far toward establishing the rule that the Federal Government may intervene in such a case, notwithstanding the

[1] A good illustration is furnished by a certain railway from New York to the West. A dispute arose between the railway managers and a municipality, because the road did not erect a more commodious railroad station. The city council passed an ordinance providing that the speed of all trains through the city limits must not exceed eight miles an hour, and this caused a delay of twenty minutes in an important through train intended to make the most rapid speed.

fact that the rate charged is entirely between points within one state.[1] If these rates were confiscatory, the right to intervene would undoubtedly exist.

In January, 1910, President Taft sent to Congress a special message, recommending among other things the plan of federal incorporation for companies engaged in interstate commerce. In February of the same year a bill, drafted by the Attorney-General and embodying the recommendations of the President, was introduced in the Senate and referred to the Committee on the Judiciary. Pending the decisions of the Supreme Court in the trust cases, this measure was not pressed and no action has thus far been taken on it, nor is there probability of its passage in the near future.

The essential provisions of this bill are worthy of mention. Section 1 provides that any five or more persons may form a corporation to engage in commerce with foreign nations, between states or within a state. Among the powers granted in Section 5, is the right to produce or manufacture in any state, territory, or district, articles or commodities which relate to interstate or foreign commerce. The constitutionality of a federal statute granting to a corporation the right to manufacture in any state has never been definitely settled. The

[1] This view was sustained by the Circuit Court of Appeals for the seventh district in an opinion rendered by Judge Sanborn in April, 1911. Shephard v. Northern Pac. Ry. Co., Federal Reporter, vol. 184, p 765

presumption is certainly in favor of this right where the whole or a part of the product is intended for interstate or foreign trade. Section 7 provides for cumulative voting. Each stockholder is entitled to one vote for each share, multiplied by the number of directors to be elected, and is permitted to cast all his votes for any one or more of the directors.

One of the most important provisions of this measure, is that contained in Section 8, which prohibits all corporations organized pursuant to the act from purchasing, acquiring, or holding stock in any other corporation. This absolutely forbids the formation of holding companies. Section 17 contains a provision to the effect that when property is furnished for stock subscriptions in place of cash, it shall be valued in such a way as to prevent fraud. The Commissioner of Corporations may appoint one or more persons to make a valuation of such property, and fix a compensation which shall be paid for it, and no stock shall have a par value in excess of the value of said property, as proved to the Commissioner of Corporations. There is also a provision in the same section that the burden of proof, if any one is defrauded by false statements of any director, is on the corporation, which must show that the one so deceived or misled did not rely upon such statements.

The directors of corporations are prohibited by Section 23 from declaring dividends, except from net profits, nor shall they withdraw any part of the

capital stock of the corporations or reduce the capital stock, except as authorized by law. There is also a provision in Section 27, that the stockholders of corporations shall be jointly and severally liable for wages due to employees other than directors, for services performed. Whenever any corporation shall fail to pay off written obligations or an execution shall be returned unsatisfied, the Commissioner of Corporations is empowered by Section 31 to appoint a special agent, of whose appointment notice shall be given to the corporation, who shall proceed to ascertain whether the corporation is in unsound financial condition, and the Commissioner of Corporations may exercise the power of appointing a receiver to take charge of it.

These briefly are some of the more important provisions of the administration measure. While they are not so comprehensive as those of the German law, yet if adopted they will go far toward eliminating the evils of corporate organization and management. If this plan prevails, it will present a most difficult problem in administration, and can only be attended with success if the administrative branch having charge of its enforcement is characterized by ability and impartiality.

CHAPTER IV

BANKING CORPORATIONS—STATE AND FEDERAL —OUR MONETARY SYSTEM

THE distinctive feature of the laws and regulations relating to banking corporations, as compared with those pertaining to other corporations, is the greater severity of the former. This statement, strictly speaking, refers only to the federal laws pertaining to national banks; nevertheless, from year to year a greater degree of supervision is being applied to organizations under state laws and state control. There are manifest reasons for this distinction, based upon weighty considerations of public policy. No failure causes so much injury to the general public as that of a bank. There are hundreds of banks in the United States, having more than fifty thousand depositors. One bank in Philadelphia has more than 250,000 depositors. Confidence in their stability is essential; they are the centers of financial operations in the communities in which they are located. The failure of a single one of them creates widespread havoc and loss, not only to depositors, but to all business interests.

From the standpoint of national or state control,

the history of banking institutions in the United States may be divided into two periods. The first commences with the Bank of North America, established in the city of Philadelphia in 1781, and extends to the year 1863, when the law providing for the organization of national banks was passed. During this first period, from 1781 to 1863, with one exception, all banks were organized under state laws, and were under the control of state authorities. The single exception was the United States Bank, also located at Philadelphia. It was first chartered in 1791, for a period of twenty years, and again in 1816, for another twenty years. The central office was at Philadelphia, but there were numerous branches located in the various states of the Union.

This first period of our banking history was characterized by a great degree of laxity and favoritism, and the same lack of uniformity in banking regulations among the different states which is now manifest in the laws relating to other corporations. For fifty years after 1781, banks were established under special charters, and the granting of a charter was often the result of political favor. Antagonism between the Federalist and Republican parties in the state of New York was never more bitter than in the controversies over the chartering of banks. This privilege was regarded as one of great value, and was given to prominent men or leaders of the one party or the other. Another

characteristic feature of the banks in this term of fifty years was that in most cases the state itself insisted upon subscribing for part of the stock. A prominent reason for this was the expectation of large profits in the banking business. Again, a share in their management was desired. It was believed that if the state held a part of the stock and shared in the management, a greater degree of consideration would be given when public loans were needed. The United States held one-fifth of the ten millions of stock of the first United States Bank, and an equal proportion of the capital of its successor.

A serious danger during all these years arose from permission to pay stock subscriptions in notes, and the absence of any effective requirement for their collection. Thus banks would begin to do business without adequate resources and without that stability which should characterize financial institutions. Bank statements and the filing of accounts were not required. Much stress was laid upon the note-issuing feature. Indeed, many of the banks were organized not for deposit banking, nor for loans to the commercial communities in which they were located, but for the privilege of issuing circulating notes. This was the most potent cause of the scandals and failures which characterized the state banking system in the years preceding the Civil War.

Two general plans for the security of notes and

obligations were adopted. One was the so-called safety-fund system in the state of New York, under which each bank issuing notes was compelled to pay an annual subscription of one-half of one per cent. of its capital until the total amount of the fund so accumulated should be 3 per cent. of their total capital. In case any one of them should fail, this fund was applied to the payment of the claims of its note-holders, depositors, and creditors, and in case the fund should at any time fall below 3 per cent. of the aggregate capital of all the banks, a further assessment was levied with a view to maintaining that amount. This plan did not prove successful. Its fundamental defect was that too much was attempted. The safety fund should have been applied first to the payment of circulating notes, and afterward to deposits. In every well-regulated banking system, there is a clear distinction between general banking obligations, and those obligations which it assumes by issuing bills or circulating notes. The depositors are supposed to have some knowledge of the standing of the institution, while persons taking its bills may be a hundred or a thousand miles distant. Circulating notes are naturally accepted with the supposition that they carry absolute security.

The second system or plan for the security of circulating notes was tried in a greater number of states, and furnished an example for the note-issuing privilege under the national banking system.

Under it the bank issuing bills deposited state bonds or securities, or in some cases mortgage notes, with some public officer, and with the privilege of issuing bills to an amount not greater than the aggregate par value of such securities. This plan was also unsuccessful. Oftentimes the bonds proved worthless, and with imperfect supervision and regulation, unscrupulous manipulation was rendered possible. The term "wildcat" was applied to banks, because in many instances they issued notes payable at some very remote place, often in thinly settled or wild localities.

A former Secretary of the Treasury, still living, appeared a few years since before the Committee on Banking and Currency of the House of Representatives, and related several almost dramatic experiences incurred while undertaking to obtain the redemption of notes of banks in this class. He found a threatening atmosphere. It was intimated that he would suffer injury, unless he departed without enforcing payment of the bills which he brought. A popular sentiment prevailed that those who held the circulating notes ought to pass them from hand to hand, and that the request for redemption was a hardship upon the bank and even upon the community in which it was located.

There was a third method or plan of regulating note issues under which banks were allowed to issue bills in proportion to the amount of their capital, the limit being fixed in some instances at

three times their capital. It is easy to recognize that under these various systems, defective in themselves, and without adequate supervision, there were almost unlimited possibilities for fraud and dishonesty, so that the methods of issuing notes which prevailed at that time inevitably led to a great amount of confusion and loss.

Another serious objection to note issues prior to the Civil War was the danger of counterfeits. Hundreds of banks issued notes, and it was practically impossible for any bank cashier to be certain of the genuineness of all the bills presented. The poor workmanship upon genuine bills offered an added temptation for counterfeiting, so that even if they were genuine, those to whom they were offered were reluctant to accept them.

Mr. McKinley used to relate a story to the effect that Horace Greeley once delivered a lecture in the Middle West, for which payment was offered in bills of a great variety. In looking them over he remarked, "Haven't you a few well executed counterfeits that you can give me in place of these bills?"

In the face of such inconvenience and danger of loss as prevailed, it was natural that means should be sought to remedy these conditions. The most notable instance was "The Suffolk Banking System," which was established in the year 1813. The Suffolk Bank at Boston undertook to act as a Clearing House for the bills of all the banks of

New England. This institution contracted with various banks that upon the deposit at its office of $5,000, it would redeem the notes of the depositing institution at its counter in Boston with the understanding, of course, that when the deposit fell below $5,000, the amount should be made good. This system placed the currency of New England upon a much better footing than that of other sections. In some states, however, such as Louisiana, Tennessee, and Indiana, banks were organized under strict rules requiring the prompt redemption of bills in gold as they were presented.

These conditions as above described, had a most important influence upon the adoption of the National Banking System in 1863, along lines first recommended by Hon. Salmon P. Chase, Secretary of the Treasury in 1861. Senator Sherman was the leading advocate of this system in Congress, and was in great measure entitled to the credit for its adoption and later development. The greatest gain accomplished by this reform was uniformity—uniformity not only in the regulation of note issues, but in the rules governing deposits and the management of banks.

The following are among the most essential regulations which distinguish national banks from the state banks which preceded them:

Fifty per cent. of stock subscriptions must be paid before the bank begins to do business, and the remaining 50 per cent. in monthly instalments

of 10 per cent. each. The banks are limited for the most part to discounting notes. No loans on real estate are permitted. The original law of 1863 permitted mortgage loans, but an amendment in 1864 forbade them. The next provision, that not more than 10 per cent. of the capital and surplus shall be loaned to any one individual or corporation, is a very salutary one. It prevents the embarrassment of a bank by the failure of a single debtor. Instances have occurred where the failure of a state bank disclosed the fact that 60 per cent. of the capital had been loaned to one corporation, the insolvency of which caused the bank to close its doors.

The act further provides that capital must not be impaired, nor can dividends be paid from capital. One-tenth of the net profits must be carried to surplus, until the surplus equals 20 per cent. of the capital. National banks cannot loan upon their own stock. Against deposits a reserve is required amounting to 25 per cent. in reserve cities, thirty-one in number, and 15 per cent. in other cities. Twenty-eight of the thirty-one reserve cities, however, have the right to maintain one-half of their required reserve in the three central reserve cities, and the country banks may maintain three-fifths of their required reserve in a reserve city. Originally the same reserve was required upon circulating notes issued by national banks, but that provision was repealed.

In one important feature our regulations of national banks are much in advance of those of Europe. They must file with the Comptroller of the Currency not less than five reports per annum, and the Comptroller can call for statements at any time. Frequent examinations of the assets and general condition are made by expert examiners, who oftentimes give helpful suggestions, and are authorized to take possession of the bank accounts and money, all the notes and assets of the bank, in order to make themselves familiar with its condition and assure themselves of its solvency.

The question of the constitutionality of the National Banking Act was much discussed in 1862 and 1863. Three or four arguments were presented in the affirmative at the time, some of which are the same as those in favor of the incorporation of the old United States Bank. An argument of undoubted validity for the establishment of the national banks is their utility as a fiscal agent or instrument of the federal treasury in facilitating the collection of public dues and in making disbursement for the payment of public obligations. The reason uppermost in the minds of its framers, however, was that the national banks would afford assistance to the government in floating its bonds. The original statute provided that each national bank should buy bonds of the United States to the amount of one-third of its capital, that is, if the capital was $1,500,000, $500,000 must be invested

in United States bonds. This law has been amended so that a less amount is now required. The rule now is that in banks with a capital of $150,000 or less, one-fourth must be invested in United States bonds, and above $150,000 of capital, a fixed amount of $50,000 is required. On these bonds the national banks were at first authorized to issue circulating notes up to 90 per cent. of the par value of the bonds. The federal treasury is responsible, both directly and indirectly, for their note issues.

When bills are presented to the Treasurer of the United States, they must be redeemed in United States notes, and the banks in turn must reimburse the Treasury, and provide a reserve of 5 per cent. for their entire circulation. Of course, the ultimate security for the payment of these bills is the deposit of United States bonds at the National Treasury. In 1900 the law was changed, so that the privilege of issuing 90 per cent. of the par value of the bonds was enlarged to 100 per cent. There is a tax of one-half of one per cent. per annum, payable semi-annually on circulation that is secured by bonds drawing 2 per cent., and a tax of 1 per cent. on bonds drawing more than 2 per cent. In the year 1865, a law was passed imposing an annual tax of 10 per cent. on the circulation of state banks. This resulted very shortly in the withdrawal of their circulation.

The degree in which the business of a country adjusts itself to its banking system, whatever it

may be, is not generally realized. France and England have widely different banking systems, especially as regards note issue, but in both countries alike, the transactions of commerce and industry seem to have adjusted themselves to the respective banking methods in vogue, so that an equal degree of stability and convenience is attained. But in our own country, conditions are so different, that it would be impossible, or practically impossible, for any of these foreign banking systems to serve as a model.

The banking system of the United States differs essentially from that of leading European countries in that there is no central bank closely connected with the state. Neither has the privilege of note-issue been abandoned by our government and concentrated in a central institution, as has been the case in most of these countries.

The concentration of note issues in Europe emphasizes the mongrel character of our currency. First we have the greenbacks issued by the government, beginning in 1862. The policy of issuing these notes based on the credit of the United States has been much criticised. Many have stated that the war might have been financed without them. In fairness it must be said that at that time there was a greatly increased demand for money, and our monetary system was entirely inadequate. There was nothing to pay the army, nothing to pay contractors. There was no supply of specie on which

to base a proper issue of money. To meet the exigencies of the time, these notes, based on the credit of the United States Government, were issued with the result that in a short time gold rose to a premium. In July, 1864, $100 of gold was worth $285 in greenbacks. The premium on gold continued until the resumption of specie payment in 1879. For almost seventeen years we had a paper currency exclusively, barring subsidiary coinage, and even that was in circulation for only part of the time. In 1878, the amount of greenbacks was fixed at $346,681,016. It was determined by statute that the amount should be neither increased above nor diminished below that sum. Accordingly we still have these greenbacks in circulation resting upon the credit of the government.

It is not necessary to describe in detail all the different kinds of currency. We have the national bank-notes issued against government bonds, the amount of which is approximately $726,000,000. Then we have the silver dollar or silver certificate.

The silver dollar was accepted as unlimited legal tender, until the year 1873, but under the legal ratio of sixteen ounces of silver to one of gold, the metal in a silver dollar was worth more than that in a gold dollar, and as a result silver dollars went out of circulation and into the melting-pot.

In 1873, an act was passed, sometimes called the "Crime of '73," which discontinued the coinage of silver dollars. The facts show that there was no

scheme or trick in the passage of that law, as is sometimes claimed. It was merely the recognition of existing conditions. Immediately afterward great silver mines were opened in Nevada, and there began an agitation, one of the most bitter in our history, for the remonetization of silver on the basis of sixteen to one. The Bland-Allison Act was passed in 1878, providing that not less than $2,000,000, nor more than $4,000,000 worth of silver was to be purchased each month, and coined into silver dollars. The advocates of silver were not satisfied, however, and in 1890 another law, known as the Silver Purchase Act, was passed, under which 4,500,000 ounces of silver per month were to be purchased and retained in the Treasury, and warrants equal to the cost of the metal were to be issued as currency. That is, if the government purchased $3,000,000 worth of silver in a month, silver purchase notes to that amount were to be put into circulation. This act was repealed in 1893.

About the year 1900 the great mass of silver in the vaults of the Treasury in the form of silver bullion impressed legislators with the desirability of retiring the silver purchase notes and coining the bullion on which they were based; so it was gradually converted into silver dollars, amounting, with other coinage, to about $564,000,000. For the most part, silver dollars are now represented by certificates. Thus when a certificate for five dollars is issued, five silver dollars will be retained in

the Treasury to redeem it. Finally we have gold coins, the amount of which increases or decreases with the gold coinage and foreign exchanges, and the gold certificates, which are issued by the United States Treasury in exchange for deposits of gold coin or bullion.

Two of these five varieties of currency just enumerated, the greenbacks and silver, amounting in all to about $900,000,000 are invariable in amount. The national bank notes, though subject to change, do not respond to business demands. Gold, as already stated, is increased or decreased as it comes in or goes out of the country, or according to the amount mined and coined. The possible variation in the volume of gold and bank notes does not give sufficient elasticity to the quantity of money in circulation. In this fact lies the chief defect in our currency system.

The currency system of England is, in a way, more rigid than ours. Practically all circulating notes are issued by the Bank of England. A few banks still have this privilege, but they are becoming less in number, and the amount issued by them smaller. Two kinds of notes are issued by the Bank of England. First those based on government and other valid securities, amounting to about 18,000,000 pounds or $90,000,000, which as regards security are practically the same as our national bank notes, being issued against an obligation of the government or one of like nature. Second,

in addition to these $90,000,000, the Issue Department of the Bank of England puts out notes which must be represented by and based upon gold. The amount of this second class of bills varies from month to month, but averages about $170,000,000, and rarely exceeds $200,000,000. The lowest denomination of the Bank of England notes is five pounds. The result is that a large amount of gold is in circulation in the form of sovereigns and half-sovereigns of a value slightly less than $5 and $2.50, respectively, while for smaller payments silver and token coins are used. The most common silver coins are the half-crown, the florin, or two shilling piece, the shilling, and the sixpence pieces, equivalent, respectively, to a little less than 62½ cents, 50 cents, 25 cents, and 12½ cents.

There is no opportunity for elasticity in the currency of England, so far as note issue is concerned. The amount secured by the government debt is practically the same always, and the other issues depend upon the quantity of gold or gold bullion in the Issuing Department of the bank. The reason for stringent regulations restricting the issuance of currency to notes based upon securities or gold, is to be found in the theories prevalent at the time when the Bank Act was adopted in 1844. Sir Robert Peel, the Prime Minister, took the position that the bank ought not to issue bills beyond the stipulated limit, even though it promptly redeemed them over its counter, because otherwise speculation would be

stimulated and the probabilities of panic increased. The evils of an inelastic currency are less noticeable in England, partly because of the greater use of checks and instruments of exchange and partly because the holding of very large credits abroad makes it possible to accumulate gold on short notice. Both these factors are powerfully reinforced by the immediate inflow of gold which results from the custom of raising the rate of discount of the Bank of England, a step always taken in time of stress.

The note issues of the Bank of France are based upon a very different theory. There is no requirement that every note shall be represented by coin or other security, but it is the rule that whenever one of its notes is presented, it must be redeemed in coin. The maximum amount that can be issued is $1,160,000,000. The present amount outstanding is $900,000,000, and a reserve of gold and silver of about three-quarters of that amount is maintained. The Bank of England cannot issue a note in addition to the limited amount based upon government security unless it has the gold in its vaults. The Bank of France can issue its notes irrespective of the reserves of gold and silver it has in its coffers, but must redeem the notes in coin whenever presented.

The Reichsbank, or Imperial Bank of Germany, has the privilege of issuing circulating notes to a fixed amount sustained by an ample reserve, in

addition to which further notes may be put in circulation, provided one-third of the additional amount issued is represented by money in the vaults, and the remaining two-thirds by commercial paper of good character. But it must pay to the government a 5 per cent. tax upon this supplemental issue. This plan is very much criticised in England, on the ground that it affords an undue liberty in the issuance of notes.

The capital stock of the Bank of England is held by private individuals, and while the management is in close touch with the government, the directors are chosen by the stockholders. The bank is the fiscal agent of the government, receiving and disbursing its deposits.

The governor and two deputy governors of the Bank of France are appointed by the government, and the stockholders choose the remaining directors. All the directors of the Bank of Germany are selected by the government, but there is a sort of supervisory board chosen by the stockholders.

An important difference between the European banks and our own is found in the number of branches. While our state banks frequently have branches, no national bank does. The Bank of England has only nine branches, while the Bank of France must maintain at least one special branch in each of the eighty departments of France, and subsidiary branches amounting in number to between five hundred and one thousand. The Bank

of Germany has even more. The idea is to make the central bank responsible for the granting of loans and the conduct of the banking operations all over France and Germany.

An erroneous opinion is entertained that the capital of these foreign institutions is many times greater than that of any bank in this country. The total capital of the Bank of France is $35,200,000 with $8,200,000 in reserve. The National City Bank and the Bank of Commerce in New York compare favorably, the former of which has a capital of $25,000,000 and a surplus of $22,000,000, and the latter a capital of $25,000,000 and a surplus of $14,000,000. The Bank of England has more than any of them. Its capital is $70,800,000 and surplus about $17,000,000. The Reichsbank has $42,800,000 capital and $16,400,000 surplus. This is less than the capital of the Bank of England, but more than that of the Bank of France or of either of the two New York banks just mentioned. In the magnitude of operations the Bank of England surpasses all others. In 1908, it carried about $259,400,000 in deposits; while the Imperial Bank of Germany had $154,400,000, and the Bank of France $134,300,000. In comparison, the two banks in New York referred to above had deposits, last autumn, amounting to $176,000,000 and $146,900,000, respectively. It would, however, be erroneous to state that on this account these institutions of New York assume a

greater importance than the foreign banks mentioned, which it might be added pay no interest on deposits.

It thus appears that there are notable differences in the organization and management of these European banks. There are also very decided differences in their methods and the scope of their transactions, as compared with our own. The greater area of our own country and the greater difficulty, notwithstanding the telephone and telegraph, with which one bank, say on the Atlantic coast, can transact business with one beyond the Mississippi, is an important feature. Other factors are the spirit of individuality, and the desire of each banker to manage his own institution, also the greater degree of independence of each bank.

One very important function of each of these foreign banks mentioned, is the control which it exerts on the rates of interest. In a troublous time each one of them raises the rate. Many fluctuations occur in the rate of the Bank of England, and a considerable number in that of the Reichsbank. The rate of the Bank of France is the lowest of the three, and subject to the least change. It is a question whether the bankers and business communities of this country would welcome an institution which sought to control the rates of interest. Suppose there should be a season when the managers of a great central institution thought

it was best to raise the rate from 4 to 5 per cent. Perhaps there would be some banks having surplus money to loan, the managers of which would not desire an increased rate. Restlessness under external control would cause many bankers and business men to say, "The domination of a central institution is not wanted."

Each bank prefers unhampered control of its interest rates. But without such influence one of the strongest reasons for a central bank disappears. If such an institution should be organized, it must not be a competitor with other banks. That was one of the greatest objections to the old United States Bank. Any central institution must be merely a bankers' bank, and the government's fiscal agent, dealing with other banks and with the government alone. The amounts which are now in the Treasury would be lodged there, and when the government made disbursements, they would be made through this bank or its branches.

Our national banks also differ from the foreign banks in that we have rigid requirements for 25 and 15 per cent. reserves. The reserves retained by the great banks abroad are usually much larger, though there is no hard and fast legal requirement. The joint stock banks of England, which transact most of the business, maintain no considerable reserve, the amount often falling to 10 per cent. or even less. The advisability of requiring a fixed reserve is open to question. A foreign

banker compared our law in this regard with his experience in obtaining a cab at Berlin. He went to a hack stand, and found only one cab there. It was a bitterly cold night, and very late. The cabman said he could not take the banker home because he was in reserve. One cab at least must always remain at the stand. In a way that incident applies to our system. When there is great demand for money and the credit of a bank is endangered, it must nevertheless hold on to its reserves. The law is sometimes violated, no doubt, and the offenders leniently treated. The question arises whether it would not be better to establish a system in which there is either one great central bank or a strong central agency which would take care of the reserve of all the banks. An important function of a central bank is the possession of strength sufficient to support all other institutions.

A sound policy demands that the final reserves of banks should be held by some institution which does not pay interest. As it now is, the smaller banks can deposit a very considerable share of their reserve, three-fifths, with the larger banks. On these deposits they receive interest, ordinarily 2 per cent. In this practice lies one of the most serious defects in our system. The reserve bank must pay the stipulated interest, and it cannot afford to do so merely for the distinction of having large balances in its coffers. It must utilize

the money upon which it pays interest. Suppose conditions are such that the ordinary demand for money is slack. The managers, in their search for some one to whom their funds may be loaned, find some speculator who will buy stocks if he can obtain low rates of interest. This continues until there is great demand for money for commercial purposes. Where is it to be obtained? Under the present system demands for money are kept constantly at a maximum. Whatever money is deposited upon which interest is paid is loaned out in a slack as well as in a busy season, and when an added demand arises there is no source from which to supply it. If there were a central reserve agency, or a central bank which paid no interest, a considerable share of the surplus balances would be lodged there, and if there was no ordinary commercial demand for discounts it would remain until needed for harvesting crops or to supply legitimate demands.

This question was once discussed by the Clearing House Association of the City of New York. A majority of bankers disapproved the payment of interest on reserve deposits, but a minority maintained that a change would disarrange the existing methods of doing business and this view prevailed. Necessarily, if there is an abolition of interest on reserves, the net result would be that less money would accumulate in the great financial centers and more remain in local banks throughout the country.

The National Monetary Commission was organized in 1908, for the purpose of studying questions of banking and currency, and recommending legislation. Of course the legislation recommended or adopted can only directly affect the national banks and national finance. There may be room for improvement in state banks, but state laws govern their management. One important question to be decided, is whether there should be a central bank or agency, and if so, what regulations shall be made for its control. This commission was organized with a membership of nine members of the House of Representatives and an equal number from the Senate. It was thought best to limit the membership to those who had legislative experience. One reason for this was that banking experts were absolutely unable to agree. It was deemed advisable that the Commission should secure information from different countries and give hearings to all who might care to appear. A very valuable library has been prepared.

It was the sentiment of the Commission that it was best to wait until it could present some measure that would satisfactorily solve these perplexing questions and meet with popular approval, rather than to recommend some hastily considered measure which would have to be repealed in a few years.[1]

[1] A summary of the so-called Aldrich Plan, recently considered by the Monetary Commission, is added as Appendix D.

In this connection attention should be directed to the exceptional difficulty of the task. There is no branch of legislation so difficult as that pertaining to banking and currency. There are more fantastical ideas on this subject than on any other and a constant clash of selfish interests. Senator Sherman said that he had helped to frame many financial measures, but that not a single one of them had ever met with his entire approval. This was true, he said, because it was necessary to make concessions to popular prejudices and to compromise with those who were actuated by local and personal reasons. He once stated that there never was a time after the enactment of the Silver Purchase Act of 1890, when he would not have been ready to vote for its repeal. It is no easy task which confronts Congress and the Monetary Commission, when they seek to frame wise and adequate financial legislation for this country. The very serious loss which has resulted from unwise and unjust laws in the past, warns us to proceed with great caution in whatever changes are to be made in the future.

The laws relating to currency in this country should be revised. There is no intelligent excuse for the issuance of paper money by the government. The natural basis for currency issues is the demands of trade. If there is a time when a very large volume of discounts based upon substantial assets is presented to a bank, that is the time

when additional currency ought to be issued. More is needed in the fall than in the spring. English writers term this seasonal demand the "autumn drain." Government currency on the other hand must be absolutely rigid or it will inevitably be issued to meet demands at a time when money should be obtained by the exercise of the taxing or borrowing power. The issue of currency is naturally a banking function, since demands for currency respond to changing business conditions. Neither the greenbacks nor the silver dollars afford any elasticity whatever, and it may prove advisable that the whole amount of greenbacks be withdrawn from circulation and some other form of currency substituted.

All considerations point to one conclusion, that the most natural foundation upon which to base currency issues is the assets of banking institutions, but that privilege, if it is granted, must be safeguarded with the utmost care. This country has already seen too many failures of banks, too many widespread disasters, because some banking institution failed to meet its obligations. The time should never come when, if a man reads that a bank has failed, he will look anxiously to his pocketbook to see if he has any of its bills.

Adequate and satisfactory security cannot be maintained by a mere safety fund. It is asserted that a fund amounting to 3 per cent. of all issues could be provided, and that all losses on bank notes

could never exceed that amount. If this is true, why should not all banks or great associations of banks unite in the guaranty? No issue of individual banks can be justified unless there is that degree of security which will afford the nearest possible approach to absolute assurance that every bill circulating through the country will be paid.

Provision for diminishing the circulation when it is redundant is quite as necessary as for increasing it when it is scarce. Under a perfect currency system, if there is a slack demand for money, notes would be canceled, and the quantity in circulation diminished. Legislation should direct that the right and the obligation to decrease must be joined with the right to increase.

CHAPTER V

CORPORATIONS AND THE PUBLIC WELFARE

ASSOCIATION or co-operation is a necessary condition of human progress, and manifests itself in many forms, political, religious, commercial, or industrial. The modern corporation as one form of association is the latest and most perfect agency for the accomplishment of results on a large scale. It renders available the collective capital and effort of many under one control. It occupies the very center of the stage in industry, finance, and commerce. Indeed it comprises the vast majority of operations in banking, insurance, transportation, and manufacture, not to mention other forms of activity. Thus, the operations of the corporation must have the most far-reaching influence upon public welfare.

The extent to which the business of the country is performed by corporations is well illustrated in a recent report summarizing the returns made for the levy of the corporation tax imposed by the Act of August 5, 1909. This shows that in 1910 there were in the United States 262,490 corporations with a capital stock of $52,371,000,000, and having a bonded indebtedness of $31,333,000,000. The net

income of all these corporations after paying fixed charges, including interest on their bonds, was $3,125,000,000. The total wealth of the United States, as estimated in 1904, aggregated $107,000,000,000. According to the rate of increase at the date of the last computation it may be estimated at $130,000,000,000 in 1910. The head of the Bureau of Statistics gives that as a conservative estimate. Very likely it is somewhat greater than that, or about $135,000,000,000, averaging between $1,400 and $1,500 per inhabitant.

It thus appears that the property owned by corporations is between three-fifths and two-thirds of the total wealth of the United States. The statement has sometimes been rather loosely made that the property of corporations comprehends as much as four-fifths. It is true that the stocks of many corporations are not remunerative, but in spite of this the income derived, $3,125,000,000, is slightly more than 6 per cent. on the whole $52,000,000,000, and in addition interest must be paid on $31,000,000,000 of bonds. This would indicate that the capitalization plus the amount of bonds correctly measures the value of their property as a whole. It must be remembered that while some stocks pay no dividends at all, others pay dividends even as high as 40 per cent. Not only is this the case, but most of the colossal fortunes acquired in this country have been gained by those interested in or associated with corporations. The corporation

stands behind our industrial and commercial activity and determines the direction of all industrial and commercial effort. All these facts lead to the conclusion that we have reached a new era in the relation between the corporations and the state.

The principle stated by Adam Smith, and adopted by the so-called classical school of political economists, was that the best method for the promotion alike of industrial activity and human welfare was to give the greatest possible freedom to each individual, to relieve industry from the harassing control of public regulation and from laws fettering the exercise of economic effort. This was the so-called *laissez-faire* doctrine. It was very well expressed by Jeremy Bentham when he said, "Industry and commerce only ask of the state that which Diogenes asked of Alexander, 'Keep out of my sunshine.'" Under the old theory, it was maintained that not only those who were directing enterprises, the captains of industry of to-day, but also employees, including workmen of all classes should be left to take care of themselves. Such theories have been very generally discredited. The evidence of this is seen in numerous laws of states and nations restricting hours of labor, the ages of working women and children, and also in such regulations as factory acts, and other laws for the preservation and safety of life and of health.

The progress made along these lines has not been entirely the result of the moral and mental disposi-

tion of legislators. As already pointed out, laws and regulations relating to corporations, as well as to all our activities, often have their basis in contemporaneous conditions. In the earlier days, when there were no factory acts, it was difficult for the workingman to obtain more than a bare subsistence. The most gratifying feature of material progress has been that in the multiplication of appliances, in the march of invention, in the opening up of new fields from which food may be obtained, and in the better means of transportation it is not only easier at the present time to sustain life, but it is possible to give to the average man and woman more comforts and luxuries, and to alleviate the burdens of toil which were so severe under less advanced conditions.

Along with provisions for the control of commercial and industrial operations and for the welfare of human beings, in the form of laws for safety of life and preservation of health, there has been a well-defined field of activity in preventing corporations from exacting extortionate charges. In nothing has this been so marked as in laws relating to charges for services to the public. The decision of Chief Justice Waite of the Supreme Court of the United States in 1876, in the case of Munn *v.* Illinois,[1] laid down the principle, that when property becomes clothed with a public interest, when used

[1] 94 U. S (S C), 113.

in a manner to make it of general consequence, and to affect the public at large, it must submit to legislative regulation. This case involved grain elevator charges in the city of Chicago. The decision of Chief Justice Waite was to the effect that it was proper for the legislature to fix charges, and that it was in no sense a judicial question. This dictum has been modified in one important particular. It has since been held by the Supreme Court of the United States and by other courts, that these legislative regulations must not go to the extent of confiscating property, that under the Fourteenth Amendment property is secured against unlawful or unjust regulation by legislative or any other authority, so that when charges have been fixed at a rate so low that it amounts to confiscation, then the courts may review or entirely set aside the action of the legislature.

This decision in the Munn case makes numerous quotations from English decisions, the language of which would seem to show that the decision of the Chief Justice initiated or established no new principle. An authority from which he quotes is Sir Matthew Hale, who said:

> A man, for his own private advantage, may, in a port or town, set up a wharf or crane, and may take what rates he and his customers can agree for cranage, wharfage, housellage, pesage; for he doth no more than is lawful for any man to do, namely, makes the most of his own. If the king or subject have a public

wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharfs only licensed by the queen, or because there is no other wharf in that port, as it may fall out where a port is newly erected; in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage, etc., neither can they be enhanced to an immoderate rate; but the duties must be reasonable and moderate, though settled by the king's license or charter. For now the wharf and crane and other conveniences are affected with a public interest, and they cease to be *juris privati* only; as if a man set out a street in new building on his own land, it is now no longer bare private interest, but is affected by a public interest.

In another place Chief Justice Waite speaks of the numerous regulations in this country for determining the prices charged by innkeepers and others who are held to exercise a quasi-public privilege, and refers with apparent approval to a case decided in the Supreme Court of Alabama, where a power granted to the city of Mobile to license bakers and regulate the weight and price of a loaf of bread was sustained on the ground that the "calling of the baker affects the public interest, or private property is employed by him in a manner which directly affects the body of the people."

If the principle may be regarded as established that the state has the right to regulate prices whenever they directly affect the body of the people,

it is necessary to consider the circumstances under which rates or prices can be so increased as to have such effect. These arise whenever any individual or corporation acquires a monopoly absolute or partial. The marvelous revolution in methods now apparent may forecast the time when an industrial or commercial corporation can become a monopoly quite as complete as that of a natural monopoly like a railway. If that situation ever arises, the question will then be raised whether the right to control the price of an article made in a factory should not be exercised in the same manner as the right to determine the rate per mile for a passenger or ton of freight.

With rare exceptions it has not thus far been deemed advisable, save in case of public service corporations, to control prices by law or regulation. But the increasing power of great industrial combinations is assuming a practical as well as a theoretical importance in its relation to the public welfare. The new conditions are not yet sufficiently well defined to enable us to forecast with entire accuracy the extent to which monopoly in any branch of industry or trade may become an established fact, though indications point to continued development in that direction.

It is a question, however, whether there are not natural as well as legal checks to the unlimited growth of combinations. While some believe that as they increase in size they gain efficiency, the

contrary view that a combination may grow so large as to become unwieldy and incapable of producing as economically as a smaller concern, is in some instances more correct. It is clear that if a combination attempts to raise prices, so long as any competition at all exists, this increase will inure as well to the benefit of independent and outside companies. This has been the experience of the United States Steel Corporation. The effect of actual or potential competition is always to bring down prices. Another fact is that whenever the prices of articles are raised where the demand is elastic, the consumption is inevitably diminished.

These factors act as a restraint upon the success of the great organizations. The question of ability in management must also be considered. Generally speaking, it has been true in this country that whenever a manager was needed for a great railway or for a large industrial establishment, it has been possible to find a man of sufficient ability. But there is no certainty that there will always be such management of these great corporations as to insure their success, especially if they continue to increase in size.

It is interesting in this connection to note the persistence of competition, notwithstanding the advantages of these great combinations. It was stated some years ago, that the American Sugar Refining Company, commonly known as the Sugar Trust, controlled 98 per cent. of the business of

refining sugar in the United States. It now controls not more than 60 or 70 per cent., which shows how competitors have made inroads upon its business. No corporation in this country, probably, has ever had so great advantages from intelligent management and from favors extended to it as the Standard Oil Company, and yet in its palmiest days the independent oil refineries were in evidence. At a time when it was at the height of its prosperity, a large company was organized which proved a formidable competitor in the foreign trade. Various estimates have been made as to the proportion of business controlled by the United States Steel Corporation. It is probable that it amounts to about one-half of the total production of iron and steel, though in certain lines it may equal 90 per cent. or even more. This corporation also has an unusual advantage in the possession of great fields of raw material, such as coal and iron ore. Nevertheless the independent iron and steel producers seem to be thriving and are building new mills.

Notwithstanding this persistence of competition, a greater degree of harmony than formerly exists to-day between the principal establishments and their competitors. A good illustration of this fact is the frequent meeting of the iron and steel men of the country. Apparently their consultations have rather more binding force than the gentlemen's agreements of thirty years ago. Clearly

this greater harmony is in pursuance of the idea which has now become more firmly fixed among producers, that competition is destructive in its effects.

Some of the radical writers say the first thing to do, is to decide which is better—combination and co-operation, or competition. If it be agreed that the former are more salutary, all this advocacy of rights and opportunities for the independent producer is wrong. We should accept the situation and assist efforts for consolidation in every possible way. But it has not yet been established that the elimination of all competition, except in the case of natural monopolies, is beneficial to the public. In fact it appears almost impossible to do away with all competition when there is a plurality of establishments engaged in the same branch of industry, whether under one management or not.

This is even true in regard to railroads belonging to the same owners, for there is a measure of rivalry among managers whenever they are given that scope in their authority and activity which will make them most efficient in accomplishing results. The readier facilities furnished by one line or a greater spirit of accommodation create a degree of competition which is incident to separate control, whatever the ownership. The efforts to obtain a larger volume of business or to effect economies also tend in the same direction.

It is said by some writers that none of these

great industrial combinations could exist except for certain well-defined advantages or privileges.

One often mentioned is the receipt of favors from railways which no doubt did exert an important influence in building up some corporations. The growth of many large companies twenty or thirty years ago, was undoubtedly associated with rebates in railroad rates. Happily this practice was virtually abolished about seven years ago.

Another argument is that they could not succeed except for the assistance afforded by the tariff. While tariffs have undoubtedly benefited certain trusts, the real explanation for their growth must be sought in more potent causes. Some combinations in this country have never been aided by protection. It would be absurd to say that the Standard Oil Company depends in any degree for its success upon the tariff, and equally absurd to make the same assertion regarding the Beef Trust. And then going beyond our own borders to foreign countries, we find similar combinations in existence. They are prominent in England where free trade has long been the settled policy.

Again, it is said that these combinations could not exist without advantages such as the possession of great quantities of raw materials or an entire or partial monopoly of natural resources. More importance should be ascribed to this assertion than to the claims regarding the effects of a protective tariff, and yet it is not entirely correct. No com-

pany has ever secured, either by purchase or by government grant, such control of any natural resource as to establish a complete monopoly. There is enough in this contention, however, to impel us to conserve our national domain. The giving away of large areas, empires you may say, to railway companies was not prompted by any dishonest intention or by any disposition of favoritism. It was thought that vast stretches of agricultural and other lands would be made available by that method, and that in giving the alternate sections to railway companies, the government added enough value to those which it retained to make it a profitable transaction. That is, if it owned two sections, each of which would sell for $1.25 per acre, and gave one to a railway company as an incentive to build, the remaining section would be worth $2.50 or more, and settlers could occupy and utilize areas theretofore unavailable.

We cannot, however, close our eyes to the fact that this policy, salutary though it may have been in the beginning, was carried too far, nor can we overlook the fact that individuals and corporations as a result of this policy have gained control of enormous areas of coal and timber lands. One of the burning questions of the time is the conservation of our natural resources. Not that they are to be kept from utilization, but that the government is not to dispose of them in such a way as to make it possible for a few men to control such a

quantity of mineral and other wealth of the country as will interfere with equality of opportunity. A judicious policy of leasing these lands would go far to solve the problem. Certainly the adoption of such a policy would be best in some localities, and for some species of mineral and timber lands, always bearing in mind, of course, the desirability of not delaying or retarding the future growth and development of the newer sections of the Union.

There is much justice in the contention of the citizens of Western states like Idaho and Montana, that they are being compelled to keep their forests intact while the Eastern states have been allowed to clear theirs for agricultural purposes.

Finally, it is asserted, with the support of a pertinent array of facts, that the great combination could not exist without the use of unfair methods, such as cutting prices in one locality, while maintaining them in others, or selling one brand below cost and recouping the loss from the profits on other brands, or refusing to sell to a retailer who also handles the goods of a competitor. Such practices as these deserve the severest condemnation. They make it possible for a less efficient producer to club out his competitors, even though they may be rendering cheaper and better service to the public.

Certain remedies have been proposed for these practices which will be discussed in the following chapter.

An important question in connection with the

modern development of combination is whether it will not eventually result in state socialism. The Socialists welcome the formation of each trust or combination. They say that trusts demonstrate the superior utility of production on a large scale, and that this movement is but paving the way for the ultimate transfer of all industrial operations to the state. It is not necessary here to enter upon a discussion of the merits of the Socialistic propaganda. It is perfectly obvious that the progress of the race has depended in the past and will depend in the future upon that degree of incentive and ambition which belongs to each individual, and that any leveling process which does away with the desire to participate in the possible rewards of personal ability and industry must bring disaster. Furthermore the formation of gigantic corporations does not necessarily mean the extinction of all the smaller concerns. In every metropolis thousands of small stores thrive in competition with the department stores, and in almost every branch of industry and commerce the man of limited means if properly protected against illegal and unfair methods has an opportunity for conducting a profitable business.

It is sometimes argued that the performance of certain services by cities and states is an entering wedge for taking over industrial and other establishments. A moment's consideration will show that these services undertaken by political organi-

zations, such as cities and states, differ widely from the general field of industry which implies a wide market with natural competition. There is a decided difference between the manufacture of gas in the city of Philadelphia and the manufacture of carpets. The former article is not merely essential for the convenience of a municipality, but its sale is necessarily restricted within a narrow area, where the duplication of competing plants would be a waste of money. On the other hand carpets can be sold from the Atlantic to the Pacific, and made in any state from Maine to California. Hence it is apparent that municipal or state control of an article of strictly local production and consumption is far different from the attempt to control the production of articles, most of which have a wide sale. On a larger scale the same distinction is true of such railways as have been taken over by the state in foreign countries. Railways are natural monopolies, whether owned by the state or by privileged corporations.

A question already referred to in the first chapter, is whether corporations will ever succeed in exercising an undue or preponderant influence upon legislation and administration. A certain degree of danger from the contribution of money by corporations to influence elections, or from the massing of their employees as voters may exist, but it has been greatly exaggerated. Decided progress has been made in the last few years by state and

national legislatures in passing laws compelling the publication of contributions for political campaigns. Laws have also been enacted forbidding corporations to contribute for this purpose. Those who to-day have charge of the practical work of conducting political contests will confirm the statement that it is much more difficult to raise money than when the names of subscribers were not made public. The massing of the employees of a large corporation may be possible, but in many instances the managers of corporations say that their employees show such a spirit of independence that they think it better not to advise them how to vote.

The danger of corrupting public servants by corporations is also much exaggerated. Mr. Champ Clark, now Speaker of the House of Representatives, recently stated that he had been sixteen years a member of Congress, and that no one had ever made a proposition to him that squinted toward corruption. The practical certainty of exposure is such, that influence by bribery is becoming each year more and more impossible, notwithstanding occasional disgraceful exposures in state legislatures and city councils. The public knows what a legislator would naturally do under given circumstances. If he does anything contrary to that, the light of inquiry is immediately turned upon him.

The personal and social affiliations of officers of

great companies and of those who are interested in them as investors is a possible source of unwholesome influence upon members of legislative or administrative bodies. The list of those identified with large corporations includes many men of very marked ability and of high standing. Nevertheless, they sometimes seek the promotion of selfish interests with intense eagerness, and by conferring favors and utilizing means at their disposal they are able to create obligations which are embarrassing. The use of passes by legislators has been forbidden by law. No person holding a public office should be allowed to accept favors of this kind. It is true, however, that an increasing number of corporate managers abstain from seeking to influence legislation, while others insist that their sole desire in presenting their side of the case to public officials or committees is to prevent unfair or discriminatory legislation.

A greater danger arises when legislative or other bodies contain an undue proportion of those interested in corporate enterprises. The promotion of personal advantage resulting in such a case would likewise exist if a majority of the members should be interested in any class of legislation. Furthermore, the reason for the action of many officials and legislators in defense of corporations is a belief that they are the best agency for promoting business and the fear that even if salutary and necessary legislation is passed, it will interfere with the

orderly and prosperous course of events. Their anxiety, as they express it, is not so much for the success of the corporation, as for the welfare of the country.

The influence of corporations on the welfare of two or three particular classes of persons displays certain well-defined tendencies. In the case of laborers, the number of men employed is naturally somewhat diminished by combination, because with large industrial plants, equipped with the very best appliances, machinery performs a larger share of the work and a less number of men is necessary. This applies especially to unskilled labor. As regards the employment of skilled labor, the tendency is not so well defined. Perhaps there again to some extent machinery takes the place of human energy, but in the complex organization of great establishments and the eager rush to have the best appliances, skill and inventive genius are valuable possessions and always in demand. There is no doubt but that large combinations have an advantage in labor disputes, because of their greater power and opportunity as compared with a smaller or single concern. They can afford to close down for a time and can accumulate stock beforehand. Then again they usually have a plurality of plants, some in one state, some in another, and if there is a strike in one mill, the orders can be transferred to another. It is also much easier to deal with men scattered over

several states than with men in one small establishment or centered in one place.

As regards welfare and the wages which can be paid, the advantages resulting from combination are in favor of the workman. The great establishment can afford to make provision in the way of pensions; it has capital enough to accumulate a fund for this purpose, and while in actual practice it may not have proved true, nevertheless, by its control of the market, by the greater utilization of by-products and the greater economies which it is able to effect, it can afford to pay better wages and give steadier employment. Labor organizations as a rule have not been opposed to the trust movement, and have undoubtedly secured some share of the gain. It is only when the trust becomes an assured monopoly that its effect upon wages may in the end be dangerous to the laborers, though such a result would not be the necessary sequence.

We come now to the influence of combination upon the welfare of the investor. Laws upon this subject have been neglected by our legislatures. The investor is the one who has suffered most from the machinations of the promoter, from overcapitalization, and from manipulation of the market. In brief, the net result has been a revolution in stockholding. In the early development of corporate enterprises, which were of course on a smaller scale than at present, subscriptions for

stock were largely made in the locality in which the corporation was located. The majority of stock is now held by capitalists, or by great institutions such as life insurance companies and savings banks, though of late there has been a successful effort by certain corporations to diffuse stock holdings among a larger number of holders. Losses from irregular or illegal methods in management and from efforts of large holders to obtain control have caused popular distrust and have had a tendency to retard the normal increase of investors, especially in speculative stocks. The demand for high-grade securities has been correspondingly increased to such an extent that their yield is unduly low as compared with the earning power of the company, and their price so high that the average citizen cannot afford to buy them. The reform that is needed is to establish such a degree of public confidence that the small investor in the United States who saves a few hundred dollars, will have confidence, as he now has in Germany, that if he invests in the stock of some corporation, he can be certain that it will be honestly managed, and he will receive his share of whatever profits are made.

The independent producer has undoubtedly suffered greatly as a result of the combination movement. He has often been a victim of ruthless competition and unfair practices, which the laws and courts seemed powerless to prevent. To the

extent, however, that the independent producer has been displaced because of inefficiency and inability to produce as cheaply as the trust, the public should be benefited rather than injured by his elimination. The disappearance of the small entrepreneur has often been deplored, but he has frequently secured a position equally remunerative, with less risk and equally effective in developing his talents in the combination which displaced him.

The consumer also has not always reaped the benefits that he should receive from the organization of a combination. With few exceptions, the prices of trust products have not been exorbitantly high, neither have they been reduced as low as conditions warranted. The trusts have been able to increase the margin of profits, by keeping prices stable, while reducing the cost of production. Finally, the producer of raw materials used by trusts, such as tobacco, oil, sugar, and beef, have sometimes been forced to dispose of these products at unremunerative prices. The danger of being compelled to make unprofitable sales is greater when the trust is the only or the principal purchaser of these articles.

The recent decisions of the Supreme Court and other cases now pending bring before us the problem of the legality of the prevalent form of combination. It is generally admitted that a company, whatever its magnitude, if it be one concern,

if the stock be subscribed for that company alone, has a legal existence which cannot be questioned. There is little doubt but that one corporation could buy outright, if acting in good faith, all the property of other corporations. But the usual method is very different. It is that of an existing company, which purchases a majority interest in the stock of others, or a company organized to buy stocks for the express purpose of controlling the operations of other corporations.

Holding companies have not been a benefit to the country. There is a normal growth of combination in industry and commerce which keeps step with the increasing demand for more and cheaper commodities. Greater efficiency and economy are possible with increased investment of capital, but the holding company is not the natural way of attaining that greater efficiency. In the first place it is contrary to the general theories in regard to corporations, according to which a concern organized to engage in some branch of business must perform the functions for which it was created. If it was created to manufacture wire nails, its funds must be expended in the purchase of machinery and raw material, and the payment of labor for the making of wire nails, and not in buying the stock of some other corporation. The holding company really produces nothing; it performs no proper economic function, and there is no justification for its organization.

Let us trace the effect of the holding company on competition. Suppose there is one great corporation having ten million dollars of capital in some line of industry, and five minor ones having two millions each, and that their capital is commensurate with the value of their assets. Suppose the large establishment seeks to absorb the whole business. Without the device of the holding company, it would be necessary to absorb each by purchase or to consolidate with the unanimous consent of all. It is reasonably certain that one of these five competitors will wish to continue in business. Even if all the plants should be purchased outright, some of their managers who have ability in that line of business would start another, perhaps more thoroughly equipped, factory. Competition would almost certainly survive if these five competing companies could only be eliminated by the ordinary means of amalgamation. But the large corporation, acting as a holding company and having the power to acquire the stocks of other corporations, can buy up, for a little over a million dollars each, a controlling interest in the five companies. Instead of requiring an investment of ten millions, competition could be eliminated by an expenditure of a little more than five millions. The evil does not end there. There is often a possibility of concealment which does not square with the best business methods. Where interholding of stock exists, it is not always easy to trace or detect the control

of one corporation by another, or to place responsibility upon the proper parties.

A very ludicrous incident illustrating this point occurred in a Southern city. A corporation was established with the name of the Good Oil Company —not at all modest in its selection of a name. The avowed and widely advertised object of that concern was to cut prices and compete with the larger corporation, which had incurred the ill-will of the public. Subsequently it became known that for three or four years it had been owned by the very corporation which it was denouncing and against which it was masquerading as a competitor, thereby capitalizing a pretended independence, when none existed.

If it seems best for a number of companies to unite because of ruinous competition or other good reason, such a course might be justified, and in most circumstances the law would interpose no barrier. But when these combinations are formed by the investment of half the amount of their capital, and frequently not by the payment of money, but by issuing new stock, then the public is not benefited, but, on the contrary, is injured. Such a power stimulates speculative control of enterprise rather than a serious effort to render efficient service. Doubtless in many cases the holding company is dealing fairly with the public, and if declared illegal, and dissolved, in some instances great injury would result. But neverthe-

less, in view of the possibilities for exploiting the public which this form of organization affords, it should be forbidden in the future, whatever course may be pursued toward those already in existence.

The true conception of a corporation is too often lost sight of. This conception was well expressed in 1809 by Judge Spencer Roane in Currie's "Administrators *v.* Mutual Assurance Society," as follows:[1]

> With respect to acts of incorporation, they ought never to be passed, but in consideration of services to be rendered to the public. This is the principle on which such charters are granted even in England (1 Bl. Com., 467), and it holds *a fortiori* in this country, as our bill of rights interdicts all exclusive and separate emoluments or privileges from the community, but in consideration of public services (Art. 4.) It may be often convenient for a set of associated individuals to have the privileges of a corporation bestowed upon them; but if their object is merely private or selfish, if it is detrimental to, or not promotive of, the public good, they have no adequate claim upon the legislature for the privilege.

In granting valuable powers and privileges to these corporate organizations, the purpose of the state is, or should be, to promote the general weal and not to enrich a certain few individuals. Un-

[1] Hening & Munford's Virginia Reports, vol. iv, pp. 347–48.

less a corporation can perform some service for the public which the individuals composing it could not accomplish individually without these powers, the corporation has no moral right to existence, and should forfeit the special privileges which it has been permitted to exercise.

CHAPTER VI

ADVISABLE REGULATION OF PRIVATE CORPORATIONS

THERE are four ways in which the state can deal with corporations. The first is to leave them alone, and allow them free course. The second, is to destroy them, the third, to regulate them, and the fourth, to acquire and own them. The first method suggested is out of the question. It would be taking a long step backward after all these years of beneficial regulations to give corporations full and unrestricted control of the respective branches of industry and transportation in which they are engaged. It would afford them a power deleterious to the public welfare. To destroy them, as suggested in the second plan, would amount to a declaration that to conduct operations on a large scale is not desirable. The fourth method, that of acquiring and operating large combinations, has its advocates. Many believe that the great transportation lines will be gradually acquired by the government, and that later the state will take over industrial establishments, one by one according to magnitude.

One of the numerous objections frequently urged

against state ownership is especially important, and that is the political effect. Last winter a prominent legislator, who is very careful in expressing his views, said that it was only a question of time until the post-office employees of this government, including those engaged in rural free delivery, would control national legislation. This is a very radical statement, to be sure, but nevertheless the creation of great classes of public employees is not for the best interests of the country. Suppose all the railroad employees, 1,699,420 in number, according to a recent statement of the Interstate Commerce Commission, should become employees of the government. They would naturally manifest a zealous interest in raising their wages and obtaining special privileges which they could not secure under private management. They could also combine with other public servants in forming a powerful political organization to advance their own interests.

The natural tendency in a wholesome democracy is to form two leading political parties divided on important questions such as the tariff, currency, or state's rights. Political contests are waged between these two parties on great vital issues. If a new idea assumes importance, one party or the other adopts it. But the existence of a number of political groups, such as appear in France, Germany, or England, paves the way for political bargaining. One element in the national legislature

will give its support to the party in power in return for concessions. The predominant party, in order to secure its assistance, is prone to enact legislation to favor this group, without sufficiently considering the best interests of the whole people. Nothing could be more serious in its effect upon the workings of our government than to introduce into our political life classes of persons who seek to promote their own interests, instead of dividing on the great questions before the people. If a large group of public employees should enter politics, other groups would naturally organize in self-protection. We would have not merely the public employees' party, but the farmers' or the grange party. Teachers in public schools might realize that they could not obtain sufficient recognition without forming a political organization of their own, and trading their support to the leaders of other political organizations in return for their assistance. Great armies of public employees, assured of permanent situations and alert in improving their own condition at the expense of the general public, would be most demoralizing in a popular government like our own. The assertion of individual interests to the detriment of national aims and aspirations is even now too plainly apparent and the adoption of any policy which would accentuate this tendency should most certainly be avoided.

Another potent objection to government owner-

ship is that the management of great enterprises would be less efficient under government than under private control. Whatever honest pride we may take in the success of our national, state, or municipal governments, we are nevertheless compelled to admit the deleterious effect of political manipulation. Other well-known objections would be the difficulty of maintaining a proper standard of promotion based upon merit and ability, and the discouragement of that individual initiative which is always necessary in promoting the progress of a great people.

It thus appears that the better method of dealing with corporations is by regulation, rather than by government ownership. The aim of regulation should be to subserve the public welfare by the adoption of such laws and the exercise of such supervision as will render corporations, great or small, helpful agencies for meeting the demands of an advancing civilization. Our aim should be to preserve to the public what is good, while eliminating that which is evil. This requires intelligent consideration and fair treatment, both for the individual citizen, and the corporation. To abolish all large corporations, or to impose unnatural or drastic restrictions upon them, is as unwise as to give them a free hand. Unreasoning clamor cannot aid in meeting the requirements of the situation. Too much emphasis cannot be laid upon the fact that what is most needed is an intelli-

gent understanding of the underlying principles which are essential to the development of commerce and industry. To this should be added the necessity for providing efficient and impartial administrative agencies to execute the regulations suggested by a judicious mastery of the problem.

Heretofore, laws, both state and national, have given too much attention to form, and not enough to actual results. Combinations have been dissolved in one locality only to reappear in another, in a form more monopolistic than before. For instance, the North River Sugar Company was dissolved by order of the New York State Courts. It immediately reincorporated under the laws of New Jersey, transferred its main office to that state, and continued to do business as before. The State of Ohio proceeded against the Standard Oil Company and a decree was entered by the State Supreme Court for its dissolution. The company continued in a state of partial disorganization for some years, and then was incorporated under the laws of New Jersey. The result was distinctly injurious to Ohio. A large office force and some of the plants of the corporation were removed to localities where the laws were more favorable.

Thus far public regulation has given undue attention to the prevention of agreements in restraint of trade, which limit competition or production, while neglecting to provide adequate

means for the punishment of palpably dishonest and illegal practices, such as the misappropriation of assets by corporate officers, the issuance of fraudulent or watered stock, the declaration of unearned dividends and the adoption of oppressive and unfair methods to destroy competition. These and other devices employed by corporations make monopoly possible and enable their promoters to gain unfair advantages. The personal delinquencies of corporate managers and their offenses against the law have received only minor attention, while the impersonal corporation has been subject to prosecutions and fines without realization of the fact that a more just and effective way is to imprison the guilty corporate officers.

The common law for many years has forbidden contracts in restraint of trade, but for more than a century, the rulings of the courts have considered the reasonableness of such agreements or contracts, and their effect upon the public welfare.

In the early days the decisions of the English courts displayed much severity in punishing those entering into contracts in restraint of trade. Not long after the year 1400, a judge declared illegal an agreement by which a party to the contract was not to engage in a certain trade, and expressed his regret that those guilty of making the agreement were not before him, so that he could send them to prison. But this view was later modified in England, as well as in our own country. In the Court

of Appeals of New York, a case arose where a manufacturer of matches had agreed that for ninety-nine years he would not engage in this business, except in the states of Nevada and Montana.[1] The contract was evidently drawn by an ingenious lawyer, with a view to meeting the former decisions of the courts in that state. The Court of Appeals decided that the contract was valid, notwithstanding the fact that the operations of the manufacturer were to be confined to two of the minor states of the Union. This decision displays an application of general principles to facts, apparently violative of the spirit of the rule.

The courts have generally decided that those contracts in restraint of trade by which a person binds himself not to pursue his calling in certain localities are valid. They have been more severe in regard to agreements relating to time. If a man is forbidden by a contract to engage in business in a certain city or state, he still has that liberty in other localities, but in accordance with public policy it has been thought best to make the rule more strict when he agrees to engage in business only after the expiration of a certain number of years, or to withdraw entirely because that not only may deprive him of a livelihood, but it also deprives the community of the benefit of his endeavors.

In this connection let us consider briefly the

[1] Diamond Match Co *v* Roeber, 106 N Y., 473.

Sherman Antitrust Act of 1890. The letter and the spirit of that act is to make every contract, combination, or conspiracy in restraint of trade illegal. This law was supplemented in 1902 by an act to expedite the hearings and annually an appropriation is made by Congress for the express purpose of enforcing the provisions of the Sherman law.

A considerable number of lawyers and others maintain that there is little difference between this act and the common law, and that illegal combinations might more readily be prevented if the Sherman law had never been enacted. However, it differs from the common law in important particulars, or, at least, makes more definite the application of its principles. It seeks to define the acts forbidden and provides remedies as follows:

1. The Federal Government undertakes the prosecution of offenders.

2. Acts in restraint of trade or for the creation of a monopoly or an attempt to create a monopoly are made misdemeanors. Specific remedies for the enforcement of the act are provided, such as the right to apply for an injunction to restrain violations thereof.

3. Other parties than the defendant corporation may be brought into court with a view to reaching in one proceeding a comprehensive settlement of the whole controversy.

4. Property owned under any contract or by any

combination, or pursuant to any conspiracy, when in the course of transportation from one state to another, or to a foreign country, shall be forfeited to the United States.

5. Any person injured may recover threefold the damages by him sustained.

The prevention of monopoly is of the utmost importance, but it should be borne in mind that the centralization of an industry or industries under one control may benefit rather than injure the public. What is especially requisite is fair dealing on the part of large concerns toward investors, consumers, and employees, and also that check which the possibility of competition imposes against exorbitant prices.

If a large combination can produce and sell articles at a less price than its competitors, and employs no unfair methods against them, is not the public benefited rather than injured? What should be prohibited is the opportunity for oppression or dishonest practices which give to the large combination an illegitimate advantage.

Numerous salutary regulations for the control of corporations have already been suggested in previous chapters. These and others will now be enumerated in summary form. Among regulations not to be adopted, or of doubtful practicability, is limitation of size, or the attempt to maintain competition where it is unnatural or unprofitable. No popular fallacy has caused greater injury

in the progress of industry than the idea that competition in itself is an all-pervading benefit, and under all circumstances can be depended upon to promote the public good. In some cities there are two telephone systems, so that the user must have two instruments and be subjected to much inconvenience. Generally speaking, a considerably larger price is paid for the use of the two systems than for one. Where there are two companies there is a duplication of office force and of equipment. While the total cost of installing and operating the two is not double the cost of one complete system, it is very much in excess, and upon this additional outlay interest must be earned. It is sometimes asserted that if the price of the service be reduced by the competition between the two companies, and one of them is eventually driven out of business, the public will not be injured. But in this case, the capital invested in the one is lost, and it is a grave mistake to suppose that any favorable result accrues when money actually and honestly expended is lost, especially if the investment is made in good faith.

It is to be hoped that industrial establishments will never attain the same degree of monopoly that naturally belongs to the railway or other public service corporation. The word "monopoly," as indicated by its derivation, means the sole sale of an article, or the sole control of some branch of industry or trade. This can only be the result of a grant

from a sovereign power, or be created by agreement or combination between all competitors. Thus far in the United States, no combinations, except those which are natural monopolies, have secured such absolute control. Competitors will always enter the field, if profits are too high, and the danger of being driven out of business by unfair means is not too great.

It goes without saying that all advantages tending toward monopoly should be strictly forbidden. The progress made in the virtual abolition of railroad rebates, formerly so common, should be followed by the complete elimination of every kind of discrimination between shippers. Such discrimination can still be effected in the furnishing of cars, in preferential switching privileges, and by devious methods difficult to detect, all of which afford abundant opportunity for the continuance of preferences to favored concerns. Formerly most of the profits of some concerns consisted of rebates from railway companies, without which they would have been unable to do business. It is impossible to conceive of a more demoralizing system than that whereby railways are able to build up the business of one concern and to cripple or destroy the business of others. Stated in a few words, it is a violation of that equality of opportunity, which is as dear to the American citizen as is his liberty or any right enjoyed under free government. It should be said that no one

rejoices more over the elimination of rebates than the traffic manager of the railroad. In part, the public has been responsible for such practices, because it insisted that competition should exist in enterprises where it does not belong.

Regulations have been suggested for the prevention of oppression or unfair competition. Some of them are not practicable or desirable under ordinary conditions, though circumstances might exist that would make them necessary. Professor John B. Clark, in his "Control of Trusts," has suggested three regulations which should be applied to corporations. The first is to prohibit a concern from selling its products at a lower price in the territory of a competitor than elsewhere. Under extreme circumstances, this might prove a reasonable and effective regulation, but its weakness is that it is necessary to deal with the motive for cutting prices. How can the line be drawn between the different zones in which sales may be made? Suppose a corporation sells its product for less in one locality than in another. It would be difficult for any public official to decide that the reason for the lower price is the presence there of a competitor which the corporation is trying to drive out. The attempt to do this would involve a degree of espionage and detail that would make the general application of such a plan impracticable. If, however, specific instances of cutting prices should be glaring and readily ascertainable, and doubtless such has been

the practice of some corporations, such a law might be passed and made effective.

In 1910 Congress passed a law of similar nature, which it is hoped, will have a salutary effect. Instances had been reported, in which railway companies had lowered their rates in competition with boat lines until the latter were driven off the rivers, and when this had been accomplished, had raised them again. In one case the rate by water between terminal points was fifty cents per hundred pounds, and by rail seventy-five cents. The railroad reduced its rate to twenty-five cents; traffic was driven off the river; and then the railway rate was raised not to seventy-five cents, but to one dollar. To remedy this evil, a provision was inserted in the new Mann-Elkins Law of 1910 to the effect that when a railway lowered its rates in competition with a waterway it could not raise them again, unless it could be shown that the lowering was for an object other than the destruction of competition. Practically, the same regulation is enforced in England.

Another of Professor Clark's suggestions, is that a corporation manufacturing and selling a number of articles in competition with a concern making only one, should be prohibited from cutting prices on that one article, in order to drive out the competitor, while recouping itself for the loss by maintaining prices on its other products. Here, as before, is involved the same difficulty of ascertaining

just what the motive for the reduction of price may be, whether it is not due to economies in production or distribution, rather than to an effort to eliminate competition.

Professor Clark's third suggestion is more practicable, and is intended to prohibit factor's agreements, by which trusts have been able to prevent retailers from selling the goods of their competitors by threatening to withhold their own brands which are good sellers and yield the retailer a good profit. The suggestion is that no large establishment shall refuse to sell to any customer. Of course, circumstances might arise, where by reason of extreme demand, a producer could not fill the orders of all customers, but in cases where the threat of refusal to sell is plainly to compel the retailer not to handle the goods of a competitor it would seem that such a regulation would prove practicable and beneficial.

Of all regulations which promise helpful results publicity should be placed first. The most common argument against greater publicity is that the public has no more right to know about a corporation's affairs than about the affairs of a private individual. Such a view shows a radical misconception of the nature of a corporation. A business organization which is incorporated is a public agency invested with public responsibility. The basis for its existence is not merely the opportunity afforded its members to make profits, but

its ability to perform a service more efficiently than any individual. At first, it may not seem desirable to impose this rule upon all the smaller corporations, but when they assume any considerable size there is no other adequate way to protect investors, creditors, and others who are affected. If there is any one reform to which we may look forward with certainty, it is that a larger degree of publicity will be required in the near future. It should begin with the stock subscription which, as already suggested, has been regulated elsewhere in one of two ways. The first is the issuance of a prospectus fully disclosing the methods of the subscription, together with the property to be taken over and its value. The other is official supervision, to see that the actual subscriptions are paid in cash and, if property is to be accepted as part of the subscription, to make sure that such property is received only at its correct valuation. Whichever of these methods is adopted in this country depends in great measure upon the degree in which, according to the judgment of the legislature, the gullible and the careless should be protected against themselves.

The extent to which the overtrustful can be imposed upon is forcibly illustrated by the recent arrests in New York City of various fraudulent users of the mails. The statement was made in these cases, that the public had been robbed of $4,000,000 by their operations, and by the devices

of others associated with them who advertised alluring schemes in the newspapers and through circulars. In some towns after the disclosures it seemed as if most of the people were anxious to know what would become of one or more of these fake institutions to which they had entrusted their money. Men and women, unfamiliar with business and well advanced in years, could not believe that these glowing representations were untrue. An advertisement was recently mailed by a real estate company in an Eastern city to thousands of school-teachers inviting the purchase of bonds of the face value of $100 each. The company had neither capital nor reserve, and indeed had no resource for payment except the profits from speculation in the purchase and sale of real estate. Possibly its promoters expected success, but the visionary with no knowledge of financiering may be as dangerous as the worst knave. One of the officials of the Post Office Department has asserted that the amounts which could be realized by mail order schemes of insignificant proportions averaged $25,000 before fraud orders were issued. The Department has also compiled a statement showing that in the year beginning July 1, 1910, $26,000,000 was filched from the public by concerns convicted of fraudulent use of the mails. Prosecutions are pending against concerns whose receipts have aggregated more than $50,000,000; while the total amount annually abstracted from

the people by such methods is conservatively estimated at the enormous sum of $250,000,000.

These facts are worthy of consideration in devising measures to compel publicity when stock subscriptions are solicited. If the government is to exercise any measure of guardianship for the protection of those who are credulous, and who invest without due care and judgment, it should adopt the very strictest regulations, such as those in force in Germany. There every dollar of the subscription must be accounted for and must be based upon substantial values. An excellent suggestion is also to be found in the proposed law for voluntary federal incorporation, already referred to, which contains a provision that when property is turned over to a corporation, an appraisal must be made, and this appraisal must be approved by the chief of the Bureau of Corporations.

Publicity should also be enforced in the matter of increasing capitalization, which is subject to the same dangers as original stock subscriptions. Here again a confiding public is likely to be imposed upon. Such regulation is also necessary because of the greater possibility for fraud by the managers of going concerns, especially if their business can be made to show a profit. The dishonest promoter is able to float securities for millions of dollars on property worth at most only a few hundred thousand. This can be more readily accomplished by means of a holding com-

pany. An example of this is to be found in the financing of the street railways of New York City, where there were six or seven corporations, one within the other, each in turn having an inflated capital, until at last the whole system toppled over because of its enormous overcapitalization. The absence of publicity, with the resultant opportunity for dishonesty, is the beginning of most of the evils in the present mismanagement of corporations—at least, from the standpoint of the stockholder and the creditor, and, indirectly, from that of the public at large.

As regards dividends, a regulation should be adopted to make sure that they shall not be declared by a corporation except from net earnings after a careful investigation, so that the capital may not be depleted for the purpose of paying a fictitious profit. The eager desire of corporate managers to make a favorable showing, combined with the insistence of the stockholders who wish a return upon their investment, promote the payment of unauthorized dividends. This phase of corporate management is not characterized by the same dishonesty as other transactions, but is equally subversive of proper control and thus demands state supervision. The laws relating to national banks, the dividends of which are carefully limited, furnish an example and a pattern for any plan of control that may be adopted.

Another regulation would be the limitation of

the activities of a corporation to definite fields to be prescribed by its charter, though the practice of granting blanket charters is not so prevalent as it was some years ago. Such a regulation is in the interest not only of competitors in those branches of business in which a corporation might extend its operations, but also in the interest of the stockholders of the corporation itself, who must face the danger, always imminent, that when a corporation goes out of its legitimate sphere, just as when a man undertakes to do something with which he is unfamiliar, failure will be the result. Another evil to be obviated by this regulation, is the possible acquisition of an undue amount of power by corporations which enlarge the scope of their operations. A good illustration is the mining and sale of coal by railroads in competition with other operators, a practice which, because of its possibilities for abuse, was prohibited by act of Congress in 1906.

A much needed reform to be inaugurated is that penal statutes should be distinct and should forbid only that which is subversive of public interest. If an amendment to the Sherman Act is adopted, it should make perfectly clear what is forbidden by the statute. As a general rule criminal intent should be the basis of prosecution, but in many instances either the proof of intent is so difficult to obtain or an offense is so injurious in itself that this rule cannot be said to have universal applica-

tion. Laws pertaining to business are frequently quite as necessary to prevent carelessness and inaccuracy as to punish the gravest moral turpitude. This is especially true in the business of banking where errors, which are not the result of criminal disposition, may cause widespread disaster. It is especially necessary to avoid an undue multiplication of penal statutes. They should not be hastily passed and should be limited to the punishment of offenses which consist of fraud or dishonesty, or are injurious to normal business development. In order to secure an efficient enforcement of the law and to maintain respect for it, unnecessary statutes, or those which cannot be enforced, should always be avoided. The whole history of the relation of the state to industry is interspersed with attempts to give direction by statute to tendencies and operations which are outside the domain of legal regulation. It is unnecessary to add that laws which are impossible of enforcement, as well as those which are not sustained by public opinion, do not belong upon the statute book. Penalties imposed upon the corporation itself may have a deterrent effect, but frequent violations of the law will not cease until the rule is established that guilt is personal. If punishment is enforced merely by fines, a corporation is tempted to gamble upon the chances of increasing profits by violating the law and paying the fine if detected, a venture which would not be taken

by a corporate officer if imprisonment were the penalty. In brief, no act should be made an offense unless it has that degree of culpability which deserves condign punishment and when the offense is once committed the penalty should be strictly enforced.

Progress has been so rapid and so many unforeseen changes have occurred that we cannot correctly forecast the regulations which will be required in the future. Numerous propositions are pending to control the prices of the products of industrial corporations in the same manner as transportation charges are now controlled. There are obvious objections to this course. It would be almost impossible for any official bureau to determine what are reasonable prices for the almost unlimited number of articles made in factories, some of which are produced in a thousand forms. Again prices are constantly changing with the different conditions of the market and the varying cost of labor and raw material. In any event it would seem essential that supervision be exercised over only a few basic articles, such as pig iron and steel billets and staple forms of cotton and woolen yarns. An almost endless complication would result from the necessity of fixing prices not only at different times but in different localities. Furthermore the prevailing high prices of the necessaries of life, about which there is so much complaint, are due not so much to the exor-

bitant charges of combinations as to the profits of middlemen. This fact not only creates a doubt as to whether high prices are generally caused by combinations but also suggests the unlimited scope of governmental action if official control of prices is attempted. Such control is to be considered only in case industrial or commercial organizations gain a larger degree of monopoly in some specific branch of industry or trade than has yet been attained or is likely to be attained in the near future.

It is conceivable that in a few years it will be found necessary to enact laws limiting the profits of corporations. Whenever this form of association assumes still greater prominence in our business life, laws might be framed under which corporations would be required to turn over to the state a percentage of their profits, if public examination disclosed that they were excessive. A tax has recently been imposed upon the net earnings of corporations, and it is quite probable that this levy may be increased in the future. A twofold basis for such a regulation would be the increasing proportion of industrial and commercial operations performed by corporations, and the increasing value of the privileges which they enjoy.

Any hard and fast requirement that all profits above a certain fixed percentage should go to the state would not be advisable, because of the difference in their magnitude and in the profitableness

of their business. Indeed, in the development of systems of taxation graduated levies have very generally been adopted and essential distinctions made in accordance with the source or quality of income. It should be said that under any such system the necessity of encouraging earnest, careful effort from the manager, should not be overlooked. That incentive would be destroyed if there were a limitation of the profits to a fixed percentage, but it would exist in case profits in excess of such a limit were divided between the corporation and the state. In some countries regulations of a similar nature have been adopted for certain public service corporations. Increased dividends might also be allowed in some cases if charges were lowered. This creates a partnership between the corporation and the state, which is of mutual benefit.

A plan for the limitation of the profits of corporations as compared with the control of prices has the merit of simplicity. The former would be comparatively easy, while the latter involves the existence of a much more extensive bureaucracy and a constant interference and minuteness of control which does not seem possible of administration.

When, however, with improved regulations and more settled business methods the success of the corporation is less uncertain than it is now, we may expect to apply to its management rules which would now seem to be ill-advised. Under present

conditions, owing to the fact that the chances for business success are so unequal, a considerable number of investors lose their money, while the really successful ones gain an amount in excess of the ordinary rates of profit. These characteristics appear in any country where rapid development of wealth is the rule, and make the problem of regulation more difficult than in countries where business conditions are more settled.

A revision of our patent laws is another remedy that has been suggested. As is well known, some corporations have been able to control the field against all competitors, largely because of the monopoly of certain devices or processes protected by patents. The Bell Telephone Company is a good illustration. Our laws provide that the term of a patent shall extend for seventeen years, unless previously granted by some other country, in which case it shall expire with that grant. With this protection, a corporation can become so firmly entrenched, that competitors can make little headway against it even after the patents have expired; and during the life of fundamental patents, related inventions are frequently acquired which can only be utilized by those possessing the original invention, and thus the continuance of the monopoly is almost without limit. It also appears that this privilege has sometimes been abused. Corporations have been known to buy up patents with the express intention of suppressing them, thus delaying techni-

cal progress and depriving the public of useful improvements. Various changes have been suggested in our patent laws, to remove the evils mentioned, the simplest one being to shorten the term of the patent from seventeen to ten years, with the privilege of renewal for another five years if consistent with public policy. This plan, it is believed, would not discourage inventive effort or the investment of capital in the development of new inventions.

Opposition to the enactment of more adequate laws for the regulation of corporations is inspired by a variety of causes, such as the spirit of inertia, the dislike of interference by public officials and an honest doubt of the utility and practicability of public control over business enterprises. The so-called doctrine of *laissez-faire* still retains a strong hold upon the American people. There can, however, be no doubt but that more perfect regulations would lead to better conditions, both for the corporation and the public. There would be fewer corporations to fail, and at the same time the unreasonable profits which are realized by various companies would be diminished. Indeed, it is to be hoped that the time may come when the citizen who can give little attention to the study of the market or of prospectuses will feel that when subscriptions for stock are invited he can invest his money with confidence. These all-important problems should be worked out gradually by an intelligent public sentiment, with a spirit of fairness on

the part of the public toward the corporation, as well as with the most scrupulous honesty on the part of the managers in dealing with the public. All must be impressed with a thorough realization of what social classes owe to each other.

At a conference of governors held in 1910, a suggestion was made that the states should have their own local coloring, but that uniform statutes should be passed so that each might retain its separate regulation of corporations. That was not a new proposition. Although in conference the governors were agreed upon the advisability of enacting uniform state laws, yet no substantial progress has been made. State laws are still widely at variance, and the regulations now imposed upon corporations show a glaring lack of uniformity. There are serious obstacles to uniformity. First, what state shall determine the type of the new laws—New Jersey or Oklahoma? What body of men is wise enough to fix a uniform system of regulation for all corporations of the respective states and retain the local coloring of each? The fault of the present situation lies not merely in the conflicting laws of the different states, but as well in the varying degrees of strictness in their administration. A measure of uniformity, also local independence and local coloring, as it is called, may very well apply to corporations of local scope, or of minor importance. But the greater enterprises are becoming more and more of national importance.

Does the corporation which makes adulterated food have the right to sell that article in a state which forbids its manufacture and sale? Must the protecting power of one state, under the guise of maintaining its prerogatives, be used to shield its corporations doing business in other states when both the form of corporate organization and the methods employed are repugnant to their laws?

There are corporations in this country, 95 per cent. of whose products go beyond the borders of the states which chartered them. Such a corporation cannot be considered as an institution of one state, nor should all its transactions be under the exclusive control of one state. There are railways which extend through eight or ten states, and by their branches embrace even a much larger area. Is it possible that the one in which the railway is incorporated can pass laws for a just and ready determination of all the questions that may at different times arise in the various jurisdictions in which it does business?

The state must, of course, retain the right to tax the tangible property of an interstate railway within its borders, including real estate and its proportionate share of the rolling stock; also it must retain such police powers and in fact such control over local rates and charges as is consistent with enforcing its operation in a manner equitable and helpful to all the states served by it. But it is not just that a state should require the carriage of a

ton of freight for a specific haul for twenty-five cents when the average cost for the same haul over the whole system is fifty cents. Uniform regulations for safety should be adopted and, so far as possible, there should be equality in the service rendered. Inasmuch as the nation has full authority over interstate commerce, and the exercise of that authority is becoming more important each year, it should have the right to control and regulate the corporate activities which are granted under that power.

The only conclusion to be derived from these facts is that the plan of federal incorporation affords the best solution for the control of railways and other corporations doing an interstate business. Such corporations should receive charters from the Federal Government, and these charters should contain the regulations suggested regarding organization, capitalization, and management. Such a plan will attack the evils at their source and prove far more effective than the attempt to regulate corporations, by enacting laws against monopoly and restraint of trade after they have grown to enormous size, as a result of a free hand in the beginning.

The optional plan of federal incorporation is preferable to the compulsory, because it brings about the desired reform gradually, and causes less disturbance to business. The upheaval caused by the compulsory plan might assume such proportions as

to nullify its good effects for a long time. It is said that if you have an optional plan of federal incorporation, companies which thrive by violations of the law would prefer to retain their state charters, and only the so-called good trusts could be induced to incorporate under the Federal Government. President Taft, in a special message to Congress, takes just the opposite view.[1] He thinks that the worst offenders would be forced to reorganize with federal charters in order to avoid prosecutions under the antitrust law. It is evident that if only the more law-abiding companies did incorporate at first, such manifest advantages would accrue to them as to almost compel others to

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[1] "The third objection, that the worst offenders will not accept federal incorporation, is easily answered The decrees of injunction recently adopted in prosecutions under the antitrust law are so thorough and sweeping that the corporations affected by them have but three courses before them:

"First, they must resolve themselves into their component parts in the different states, with a consequent loss to themselves of capital and effective organization and to the country of concentrated energy and enterprise; or

"Second, in defiance of law and under some secret trust they must attempt to continue their business in violation of the federal statute, and thus incur the penalties of contempt and bring on an inevitable criminal prosecution of the individuals named in the decree and their associates, or,

"Third, they must reorganize and accept in good faith the federal charter I suggest."—*Special Message of the President of the United States on Interstate Commerce and Antitrust Laws and Federal Incorporation, January* 7, 1910.

follow their example. Furthermore, after a period of trial, the voluntary plan could easily be changed to a compulsory one, if necessity demanded.

An argument sometimes urged against the plan of federal incorporation is that it would drive all state corporations under national control. This same argument was strongly urged against the adoption of the national banking system nearly fifty years ago. But no such direful result has been witnessed. National and state banks, and trust companies, are doing business on the same street, and during the last ten years the deposits of state banks and trust companies have increased more rapidly than those of the national banks. There is no friction between them, but rather a wholesome competition. It is very probable that under the plan of federal incorporation a large number of companies would still retain their state charters although doing some interstate business, while all those corporations whose activities are confined to a single state would not be included within the scope of the act. And so, while the opposition to national incorporation is likely to prevent the adoption of this plan for some years to come, yet such a solution of our most serious corporate problems seem inevitable.

In conclusion it is hoped that the suggestions contained in these chapters may awaken some interest in the relation of the corporation to the state, for this subject not merely concerns the making of

cloth, or of iron, or the operation of railways, but the whole future of this country. It has a most important bearing upon our industrial and commercial interests, and an even wider scope in its effects upon the whole range of social and political conditions.

It is meet that we, who boast that we have framed and now possess the latest and best experiment in government, should also prove that the corporations can be so managed as not merely to subserve the growth of this magnificent industrial country, but in such a way as shall be best for the common weal, and shall best promote that equality of opportunity which is our birthright.

CHAPTER VII

THE DECISIONS OF THE SUPREME COURT IN THE STANDARD OIL AND AMERICAN TOBACCO TRUST CASES[1]

THE decisions rendered by the Supreme Court of the United States in the Standard Oil and Tobacco Trust cases have attracted wide attention and aroused much comment, favorable and unfavorable. The case against the Standard Oil Company was begun in the Circuit Court for the Eastern District of Missouri in November, 1906, and that against the American Tobacco Company in the Circuit Court for the Southern District of New York, July, 1907. Both cases reached the Supreme Court during the year 1909, but owing to the unfortunate death or illness of some of the Justices, and the subsequent rehearing, they were under consideration for a period of nearly two years. The Supreme Court declares both companies illegal, and orders their dissolution. The Standard Oil Company is given a period of six months in which to reorganize in conformity with the Sherman Law, while the Tobacco Company,

[1] This chapter does not constitute a part of the lectures delivered at the University of Pennsylvania in 1910, but has been added since the Supreme Court decisions were rendered.

owing to the complexity of its corporate structure, is placed under the control of the Circuit Court, which is directed to devise some form of reorganization not repugnant to the law. If at the end of eight months the Court has not worked out such a plan of reorganization, or accepted one proposed to it by those concerned, it is directed to prohibit the Tobacco Company from further participation in interstate commerce, or to place the company in the hands of a receiver, who shall give effect to the requirements of the statute. This, in some respects, is a novel proceeding in our judicial development, and is being watched with a great deal of interest, especially by those corporations the legality of whose organization is still in doubt. In all probability a number of trusts will voluntarily adopt the plan of organization finally approved by the Circuit Court.

The basis of the adverse decision of the Supreme Court in the Standard Oil case, is the wrongful intent manifest by those in control from about the year 1870. The form of corporation adopted later, that of a holding company with a New Jersey charter, is not directly attacked, although the fact that by this means its organizers were able to secure and maintain such complete dominion over the oil business is considered by the Supreme Court as *primâ facie* evidence of the wrongful intent to restrain trade. The purpose of the organizers of this corporation to monopolize the oil business is shown

by the various methods employed in driving out competitors. The Court mentions especially the use of railway rebates, the control of pipe lines and various other acts intended to exclude others from their right to engage in the same business. The wrongful intent is especially shown by the expansion of the New Jersey corporation, concerning which the court makes the following statement:

> The exercise of the power which resulted from that organization fortifies the foregoing conclusions, since the development which came, the acquisition here and there which ensued of every efficient means by which competition could have been asserted, the slow but resistless methods which followed, by which means of transportation were absorbed and brought under control, the system of marketing which was adopted by which the country was divided into districts and the trade in each district in oil was turned over to a designated corporation within the combination and all others were excluded, all lead the mind up to a conviction of a purpose and intent which we think is so certain as practically to cause the subject not to be within the domain of reasonable contention.

The grounds on which the Supreme Court declared the American Tobacco Company an illegal combination, as in the Standard Oil case, appear to be not so much its form or size, as the conscious intent on the part of a few persons to monopolize all branches of the tobacco business by methods manifestly unfair and illegal. In some cases fierce

trade wars were engaged in to drive out competitors. This was especially true in the Plug Tobacco and Snuff wars which occurred in the nineties. In other cases excessive amounts were paid to independent producers, to induce them to sell out and agree to keep out of the tobacco business for a considerable number of years. For instance, the National Tobacco Works, capitalized at $400,000, received $600,000 in cash and $1,200,000 in stock of the American Tobacco Company. Many plants thus acquired were soon dismantled. Subsidiary corporations, nominally independent but secretly controlled by this same group of capitalists, were organized and put into the field to drive out or prevent the entry of competitors. Such wrongful acts as these, in the opinion of the Supreme Court, endanger individual liberty and are a menace to public welfare. It was just such conduct that the Sherman law was intended to prevent.

In the American Tobacco case, the Supreme Court sums up the charges against the company as follows:

> Indeed, the history of the combination is so replete with the doing of acts which it was the obvious purpose of the statute to forbid, so demonstrative of the existence from the beginning of a purpose to acquire dominion and control of the tobacco trade, not by the mere exertion of the ordinary right to contract and to trade, but by methods devised in order to monopolize the trade by driving competitors out of business, which

were ruthlessly carried out upon the assumption that to work upon the fears or play upon the cupidity of competitors would make success possible. We say these conclusions are inevitable, not because of the vast amount of property aggregated by the combination, not because alone of the many corporations which the proof shows were united by resort to one device or another. Again, not alone because of the dominion and control over the tobacco trade which actually exists, but because we think the conclusion of wrongful purpose and illegal combination is overwhelmingly established by the following considerations, etc.[1]

The particular feature of these decisions to which most significance should be attached is the interpretation placed by a majority of the Court upon the Sherman Antitrust Law. Much difference of opinion exists as to the ultimate effect and scope of this interpretation. The strong dissenting opinion of Justice Harlan, together with the absence of protest by business interests of the country, and the sudden rise in the stock market following the decision in the Standard Oil Case, might lead to the inference that the Sherman Law has been seriously emasculated. That this view is also shared by some legislators, is shown by the fact that a number of amendments, intended to restore to the Sherman Law its original meaning, as they had interpreted it, were introduced in Congress

[1] For full text see Appendix A, p. 201.

immediately after the Standard Oil decision was rendered. On the other hand, it is believed by many, that the law has been made to harmonize with existing conditions, and has been strengthened and made more effective as a result of the new interpretation.

Chief Justice White, who rendered the majority opinion in both cases, holds that the words "restraint of trade" and "monopolize" should have the meaning which they had at common law when the Antitrust Act was passed, and to this end he reviews the common law principle of restraint of trade as it was applied in England, and as it was later adopted into the laws of this country. In the absence of any exact definition of these terms, he holds that they should be interpreted in the light of reason, as they were at common law. Applying this standard, he holds that not all contracts in restraint of trade are illegal, but only those contracts which necessarily tend to develop monopoly, control prices, and limit output. The clearest and most concise statement of the Court's position is found in the decision rendered in the Tobacco Trust case, as follows:

> Applying the rule of reason to the construction of the statute, it was held, in the Standard Oil case, that as the words "restraint of trade" at common law and in the law of this country at the time of the adoption of the Antitrust Acts only embraced acts, or contracts, or agreements or combinations which operated

to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade, or which, either because of their inherent nature, or effect, or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words, as used in the statute, were designed to have, and did have, a like significance. It was therefore pointed out that the statute did not forbid or restrain power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose.[1]

The whole controversy over this opinion of the Supreme Court turns around the question whether it has read into the Sherman Law the words "unreasonable" or "undue" before the words "restraint of trade," and "monopolize." This is the premise on which the dissenting opinion of Justice Harlan is based, and if it is true then there is no escape from the conclusion that the commonly accepted interpretation of its meaning has been erroneous. The question of amending the law by introducing the element of reasonableness or unreasonableness has been frequently discussed, and the conclusion has been almost unanimous that it could not safely be done. The Judiciary Committee of the Senate in 1909, in a report upon a bill to modify the Sherman Law, made the following statement:

[1] For full text see Appendix A, p. 198

To inject into the act the question of whether an agreement or combination is reasonable or unreasonable, would render the act as a criminal or penal statute indefinite and uncertain, and hence, to that extent, utterly nugatory and void, and would practically amount to a repeal of that part of the act.

and further on the committee say:

And while the same technical objection does not apply to civil prosecutions, the injection of the rule of reasonableness or unreasonableness would lead to the greatest variableness and uncertainty in the enforcement of the law. The defence of reasonable restraint would be made in every case and there would be as many different rules of reasonableness as cases, courts, and juries. What one court or jury might deem unreasonable another court or jury might deem reasonable

President Taft in his message to Congress in January, 1910, also opposed the proposition to insert these words into the language of the Sherman Law, and stated his objection as follows:

I venture to think that this is to put into the hands of the Court a power, impossible to exercise on any consistent principle which will insure the uniformity of decision essential to just judgment. It is to thrust upon the courts a burden that they have no precedents to enable them to carry, and to give them a power approaching the arbitrary, the abuse of which might involve our whole judicial system in disaster.

The Supreme Court in both decisions several times uses the words "undue" or "unduly" in connection with the term "restraint of trade." Justice Harlan calls attention to the fact that in the Standard Oil case the court practically informs the subsidiary companies that they may join in an agreement to restrain commerce among the states, provided such restraint be not "undue." On the other hand, viewing both decisions in their entirety, we may interpret them as showing that the intention of the court was simply to remove from the scope of the law only such contracts or agreements as are necessary, normal, and helpful to promote legitimate business.

Since the decisions of the Supreme Court in the Trans-Missouri Freight, and the Joint Traffic Association cases, the predominant opinion has been that every contract or agreement in any way restraining interstate trade was illegal. Justice Peckham, who rendered the opinion in both these cases, said in the former:

> The language of the act includes *every* contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations. So far as the very terms of the statute go, they apply to *any* contract of the nature described.

In another place Justice Peckham more specifically says:

By the simple use of the term "contract in restraint of trade," all contracts of that nature, whether valid or otherwise, would be included, and not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade. . . . The plain and ordinary meaning of such language is not limited to that kind of contract alone which is an unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress.

The lower courts have generally accepted this view of the law. Judge Lacombe in the case of the Tobacco Company in the Circuit Court for the Southern District of New York (164 Federal Reporter, 702) said:

But every aggregation of individuals or corporations, formerly independent, immediately upon its formation terminates an existing competition, whether or not some other competition may arise. The act as above construed prohibits every contract or combination in restraint of competition. Size is not made a test: Two individuals who have been driving rival express wagons between villages in two contiguous states, who enter into a combination to join forces and operate a single line restrain an existing competition; and it would seem to make little difference whether they make such combination more effective by forming a partnership or not.

An especially clear statement of the view of

the Sherman Law formerly prevailing is found in an opinion rendered by Justice Day in the case of the United States *vs.* Chesapeake & Ohio Fuel Co., while he was one of the judges of the Circuit Court of Appeals for the Sixth District. In this case he said:

> Congress has seen fit to prohibit all contracts in restraint of trade. It has not left to the courts the consideration of the question whether such restraint is reasonable or unreasonable, or whether the contract would have been illegal at the common law or not. The act leaves for consideration by judicial authority, no question of this character, but all contracts and combinations are declared illegal, if in restraint of trade or commerce among the states.

It was evidently the intention of the Supreme Court in the two decisions under discussion to modify this view of the law, for it says in the Standard Oil case, that to follow this narrow interpretation would be to destroy "all right to contract or agree or combine in any respect whatever, as to the subjects embraced in interstate trade or commerce."

As already stated, Justice Harlan in his dissenting opinion in the Standard Oil case maintains that the court has injected the word "unreasonable" into the Sherman Law, and in so doing has not only reversed the decision of the court in preceding cases, but has indulged in judicial legislation. He

asserts that the Court has in effect amended the Sherman Law, which right belongs to Congress alone, and not to the courts. In the Tobacco case he also states that this opinion of the court is *obiter dicta*. On this point he says:

> Let me say, also, that as we all agree that the combination in question was illegal under any construction of the Antitrust Act, there was not the slightest necessity to enter upon an extended argument to show that the Act of Congress was to be read as if it contained the word "unreasonable" or "undue." All that is said in the Court's opinion in support of that view, is, I say with respect, *obiter dicta*.

If Justice Harlan is correct in this contention, the opinion of Chief Justice White would not be binding upon the lower courts or upon the future decisions of the Supreme Court.

But this opinion cannot be regarded as *obiter dicta*, as those words are commonly understood. It was the very evident intention of the Court to enunciate rules which should settle perplexing questions relating to the scope of the Sherman Antitrust Law, and manifestly the opinion rendered by the majority received as mature consideration as the judgment of the Court itself.

In reading the conflicting opinions in the two cases it appears that the difference between the learned judges is largely one of phraseology. Justice Harlan avers that in defining what is prohibited

by the Sherman law the Court, in the most unequivocal terms, has repeatedly held that combinations or acts in restraint of trade were alike violative of the statute whether such acts were considered unreasonable, or reasonable and productive of salutary results in the transaction of business. On the other hand, Chief Justice White, in both decisions maintains that the interpretation of the Sherman Law adopted by the Court is in line with, and not a reversal of, the earlier position of the Court, and bases his contention upon the definition of the term "restraint of trade." It is maintained by him that it is of fundamental importance to define at the very outset, what is restraint of trade, and that this question must be determined in accordance with the rule of reason. In applying the rule of reason, resort may be had to the decisions of the common law. It thus appears that in the assertion of this distinction, namely, that it should be first determined what is restraint of trade, a conclusion may be reached by the courts that acts which have been commonly regarded as contrary to the Antitrust Law, because they involve the elimination of competition, are nevertheless not in restraint of trade. The Chief Justice also lays stress upon the different conceptions of economic conditions accepted from time to time, and refers to the fact that acts which were at one time deemed to be of such a character as to justify the inference of wrongful intent, were at another period thought not to be of that character.

In support of his contention that the Court has not reversed itself, the Chief Justice in the Tobacco cases says:

> In that (the Standard Oil) case it was held, without departing from any previous decision of the Court, that as the statute had not defined the words restraint of trade, it became necessary to construe those words, a duty which could only be discharged by a resort to reason. We say the doctrine thus stated was in accord with all the previous decisions of this Court, despite the fact that the contrary view was sometimes erroneously attributed to some of the expressions used in two prior decisions (the Trans-Missouri Freight Association and Joint Traffic cases, 166 U. S., 290, and 171 U. S., 505).

In his dissenting opinion in the Standard Oil case, Justice Harlan quotes extensively from both the two railroad cases just mentioned in support of his contention that the Court by inserting the word "unreasonable" has completely overruled its position in the earlier cases,[1] and the two extracts from these decisions cited above, as well as the history of these cases, seem to bear out his contention.

At the time the Trans-Missouri Freight Association case was before the lower court in 1892, Judge Riner took the ground that the Sherman law did not apply to any reasonable regulation of freight rates between competing common carriers. This

[1] See Appendix B, p. 208.

view was affirmed by Judge Sanborn of the Circuit Court of Appeals in 1893. But as already stated, the Supreme Court of the United States overruled the judgment of the lower courts on the ground that the law without any limitation applied to all contracts in restraint of trade, whether reasonable or not. Justice White, now Chief Justice, wrote a strong dissenting opinion in this case which in the main followed the reasoning of the lower courts. The views presented at that time by him resemble the opinions rendered by him in the two recent trust cases. When the Joint Traffic Association case came before the Supreme Court in 1896, the arguments of Justice White in his minority opinion in the previous case were again urged upon the Court, but it emphatically overruled them in the following words:

> It is not now alleged that the Court on the former occasion overlooked any argument for the respondents or misapplied any controlling authority. It is simply insisted that the Court, notwithstanding the arguments for an opposite view, arrived at an erroneous result which, for reasons already stated, ought to be reconsidered and reversed. As we have twice already deliberately and earnestly considered the same arguments which are now for a third time pressed upon our attention, it could hardly be expected that our opinion should now change from that already expressed.

The Court in these recent trust cases was con-

fronted with the difficult problem of giving a more liberal definition of the term "restraint of trade" and yet maintaining substantial consistency with its former decisions. On the one hand, it must interpret the law in such a way that the word unreasonable should not be understood to have been inserted before the words "restraint of trade" and "monopolize." On the other hand it must refrain from giving such a narrow interpretation as would make the law destructive of all normal business methods. Careful consideration of the two opinions rendered by the Court would seem to warrant the belief that it has successfully avoided these two pitfalls, and has simply asserted that in deciding upon such cases, it is permitted under the law to use its judgment as to whether the acts or transactions of any defendant are such as would restrict competition to an extent detrimental to public welfare. If this has been accomplished by the Court, then undoubtedly the Sherman law has been greatly strengthened instead of emasculated as a result of this interpretation. The narrower view of the law is so drastic as to prohibit, if applied, those business methods which tend to promote rather than to restrain interstate trade and commerce. Under such an interpretation, legitimate business might be declared illegal if brought into court, and guilty parties to an illegal combination might on technicalities escape prosecution. The lower court in taking the narrower view of the

law in the Tobacco case attacked the form of combination rather than its intent and effect, and accordingly was forced to release three subsidiary corporations and a number of persons which the Supreme Court under a stricter interpretation brought within the meaning of the law.

The Sherman Law has also been materially strengthened by the fact that in these two cases the Supreme Court has finally and conclusively overruled its position in the Knight Sugar Case, decided in January, 1895. Owing to the insufficiency of the allegations presented by the government's prosecuting attorneys in both the lower and higher courts, this case was decided against the government. The American Sugar Refining Company was indicted for the monopolistic control of the manufacture of refined sugar, instead of the combined business of refining and selling sugar throughout the United States. The Supreme Court, while not denying that the trust was a monopoly, expressed the view that monopoly in production does not necessarily and directly restrain commerce among the states. It held that the Federal Government had no control over the manufacture of sugar. This was a matter subject only to state regulations; the authority of Congress was limited to interstate and foreign commerce. After this decision it was believed by many for years that the Sherman Law could not be constitutionally applied to industrial combinations. The overruling of such

a view of the law has greatly strengthened the hands of the government in the control of industrial corporations in the future.

An important question connected with these decisions is whether they have cleared the atmosphere so that all organizations doing an interstate business can know whether they are legal or illegal.

It was confidently hoped that this would be the outcome, but the general feeling at present is that the situation is still somewhat uncertain. The Supreme Court has pointed out that normal contracts and methods, such as are necessary to conduct legitimate business, are not illegal under the law as interpreted in the light of reason. It has also pointed out on the other side that a combination which employs unfair methods to drive competitors out of business or force them into a combination, is illegal. One question which the court has not settled conclusively is whether a combination of competing concerns brought about not by coercion, but by mutual consent, which does not attempt to stifle the competition of rival concerns is contrary to law. The decision still leaves some uncertainty as to whether the holding company form of organization, in and of itself, would be considered illegal, a question which would assume especial importance if by this means a given industry were monopolized. The natural inference from these cases, however, is that no form of corporate organization is necessarily illegal except

when its practices are characterized by wrongful intent.

The conclusion which the public may derive from these decisions, is that a somewhat different rule will be observed hereafter in relation to acts in restraint of trade. The question of benefit or injury to the public welfare in the case of any particular act will presumably receive greater attention and more will be left to the discretion of the courts. The use of the rule of reason will leave a larger responsibility to the courts and an added degree of flexibility in the treatment of combinations engaged in trade or commerce, in the application of which great regard will be given to the circumstances of each particular case. It would be too much to expect that the legality of every form of organization will be free from doubt, but at least additional light has been thrown upon the subject, and a greater degree of certainty has been attained.

The most important question connected with these decisions is whether the Sherman Law as thus interpreted will prove adequate in the future for the regulation of large combinations. In this connection it will be recalled that the Standard Oil Company or its predecessor has been engaged in clubbing its competitors, and in other unfair practices since about 1872. During twenty-one years of this time, the Sherman Law has been in force, and yet only in this year, 1911, has this trust been finally brought to justice.

Between the years 1891–1898, the original American Tobacco Company acquired the ownership of fifteen other concerns, and in the so-called plug tobacco war, lost millions in coercing competitors. It organized the Continental Tobacco Company, and together with this new concern bought up a large number of competing corporations and firms, many of which were promptly abandoned. All this time the Sherman Law was on the statute books, and these practices were just as illegal then as now. It is only during the last decade that any vigorous attempt has been made by the government to enforce the law against industrial combinations. In the next place, the law attacks combinations only when they have grown to full size as the result of illegal practices. Then when they are declared illegal by the court, all that is necessary, apparently, is for them to devise some new form of combination which the Court has not yet passed upon, and proceed with the conduct of its business as before.

As stated in the preceding chapters, the only rational way for the government to control corporations doing an interstate business is to limit the powers and privileges granted by their charters and to subject them to adequate and uniform regulations. This can only be accomplished by adopting the plan of federal incorporation. At present the only control which the government exercises over corporations is by lawsuit. It must wait until some

offense is alleged against a corporation before passing upon the legality of its business methods.

These decisions have also called attention to the desirability of establishing a body similar to the Interstate Commerce Commission which shall supervise and control the affairs of industrial corporations. The action of the Supreme Court in imposing upon the Circuit Court the duty of supervising and assisting the Tobacco Trust to reorganize shows the usefulness of an administrative body to perform regularly this sort of work. It has also been suggested that the Bureau of Corporations could perform such functions if granted the power by Congress.

Questions relating to the definition of restraint of trade and monopoly and the proper interpretation of the Sherman Law, important as they are, are nevertheless overshadowed by a problem more far-reaching, namely, the benefit or injury to the general welfare of great aggregations of capital in industry, trade, and transportation. Before any judicious or adequate conclusion can be reached, the economic and social effect of combinations and large scale operations must be determined. Plausible arguments may be alleged in favor of a continuance of the former order of things, under which business transactions were conducted by individuals or smaller organizations. It may be urged that social well-being is promoted when the

industrial field is occupied by lesser units, but modern progress is making rapid strides in the opposite direction. Every nation is engaged in a rivalry for advantages in the world's trade, and the massing of capital in manufacturing and commerce seems to be best adapted to secure efficiency, though this does not necessarily mean that there is to be no limit upon combination or size. At present the intelligent solution of the relation of corporations to the public is clouded by a very natural feeling of antagonism toward them, engendered by the misconduct of many of their managers.

In the investigation of new phases of modern industry and commerce, it is difficult to depart from widely accepted views which have been so ably presented by numerous economists for more than a hundred years. They have dwelt upon competition as the life of trade, and the idea is still general that it is essential to normal development. In the preceding pages the advantages of competition and the obstacles in the way of a new era of combination have been carefully set forth. The people cannot readily reconcile themselves to new conditions and relations in which great aggregations of capital and the constantly increasing concentration of industry are distinctive features. While the ultimate solution cannot be forecast with accuracy, every present indication points to a period in which combination will assume increas-

ing importance in all lines of industry and trade, and if such a régime becomes established adequate regulation must accompany it as a necessary sequence.

APPENDICES

APPENDIX A

EXTRACTS FROM THE OPINIONS OF CHIEF-JUSTICE WHITE IN THE STANDARD OIL AND AMERICAN TOBACCO CASES WITH REFERENCE TO THE CONSTRUCTION OF THE ANTITRUST ACT

From the Standard Oil Case

WITHOUT going into detail and but very briefly surveying the whole field, it may be, with accuracy, said that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but, on the contrary, were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals,

thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy It is equally true to say that the survey of the legislation in this country on this subject from the beginning will show, depending as it did upon the economic conceptions which obtained at the time when the legislation was adopted or judicial decision was rendered, that contracts or acts were at one time deemed to be of such a character as to justify the inference of wrongful intent which were at another period thought not to be of that character. But this again, as we have seen, simply followed the line of development of the law of England.

Let us consider the language of the first and second sections, guided by the principle that where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary.[1]

As to the first section, the words to be interpreted are: "Every contract, combination in the form of trust or otherwise or conspiracy in restraint of trade or commerce . . . is hereby declared to be illegal."

As there is no room for dispute that the statute was intended to formulate a rule for the regulation of interstate and foreign commerce, the question is what was the rule which it adopted?

In view of the common law and the law in this country as to restraint of trade, which we have reviewed, and the illuminating effect which that history

[1] Swearingen *v.* United States (161 U. S , 446) , United States *v* Wong Kim Ark (169 U. S , 649) ; Keck *v.* United States (172 U. S., 446) ; Kepner *v.* United States (195 U. S., 126).

must have under the rule to which we have referred, we think it results:

(*a*) That the context manifests that the statute was drawn in the light of the existing practical conception of the law of restraint of trade, because it groups as within that class, not only contracts which were in restraint of trade in the subjective sense, but all contracts or acts which theoretically were attempts to monopolize, yet which in practice had come to be considered as in restraint of trade in a broad sense.

(*b*) That in view of the many new forms of contracts and combinations which were being evolved from existing economic conditions, it was deemed essential by an all-embracing enumeration to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation. The statute under this view evidences the intent not to restrain the right to make and enforce contracts, whether resulting from combinations or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint.

(*c*) And as the contracts or acts embraced in the provision were not expressly defined, since the enumeration addressed itself simply to classes of acts, those classes being broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce or the subjects of such commerce, and thus caused any act done by any of the enumerated methods anywhere in the whole field of human activity to be illegal if in restraint of trade, it inevitably follows that the provision necessarily called

for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibitions contained in the statute had or had not in any given case been violated Thus not specifying but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided

And a consideration of the text of the second section serves to establish that it was intended to supplement the first and to make sure that by no possible guise could the public policy embodied in the first section be frustrated or evaded. The prohibitions of the second embrace "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations . . ." By reference to the terms of Section 8 it is certain that the word "person" clearly implies a corporation as well as an individual.

The commerce referred to by the words "in part" construed in the light of the manifest purpose of the statute has both a geographical and a distributive significance—that is, it includes any portion of the United States and any one of the classes of things forming a part of interstate or foreign commerce.

Undoubtedly, the words "to monopolize" and "monopolize," as used in the section reach every act bringing about the prohibited results. The ambiguity, if any, is involved in determining what is intended by

monopolize. But this ambiguity is readily dispelled in the light of the previous history of the law of restraint of trade to which we have referred and the indication which it gives of the practical evolution by which monopoly and the acts which produce the same result as monopoly—that is, an undue restraint of the course of trade—all came to be spoken of as and to be, indeed, synonymous with restraint of trade. In other words, having by the first section forbidden all means of monopolizing trade—that is, unduly restraining it by means of every contract, combination, etc.—the second section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section—that is, restraints of trade—by any attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the first section. And, of course, when the second section is thus harmonized with and made, as it was intended to be, the complement of the first, it becomes obvious that the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed is the rule of reason guided by the established law and by the plain duty to enforce the prohibitions of the act and thus the public policy which its restrictions were obviously enacted to subserve. And it is worthy of observation, as we have previously remarked concerning the common law, that although the statute, by the comprehensiveness of the enumerations embodied in both the first and second sections, makes it certain that its purpose was to prevent undue restraints of every kind or nature, nevertheless, by the omission of any direct prohibition

against monopoly in the concrete, it indicates a consciousness that the freedom of the individual right to contract, when not unduly or improperly exercised, was the most efficient means for the prevention of monopoly, since the operation of the centrifugal and centripetal forces resulting from the right to freely contract was the means by which monopoly would be inevitably prevented if no extraneous or sovereign power imposed it and no right to make unlawful contracts having a monopolistic tendency were permitted. In other words, that freedom to contract was the essence of freedom from undue restraint on the right to contract.

Clear, as it seems to us is the meaning of the provisions of the statute, in the light of the review which we have made, nevertheless before definitely applying that meaning it behooves us to consider the contentions urged on one side or the other concerning the meaning of the statute, which, if maintained, would give to it in some aspects a much wider and in every view at least a somewhat different significance And to do this brings us to the second question, which, at the outset, we have stated it was our purpose to consider and dispose of.

Second. The contentions of the parties as to the meaning of the statute and the decisions of this court relied upon concerning those contentions.

In substance, the propositions urged by the Government are reducible to this. That the language of the statute embraces every contract, combination, etc., in restraint of trade, and hence its text leaves no room for the exercise of judgment, but simply imposes the plain duty of applying its prohibitions to every case within its literal language The error involved lies in assuming the matter to be decided. This is true because, as

the acts which may come under the classes stated in the first section and the restraint of trade to which that section applies are not specifically enumerated or defined, it is obvious that judgment must in every case be called into play in order to determine whether a particular act is embraced within the statutory classes and whether, if the act is within such classes, its nature or effect causes it to be a restraint of trade within the intendment of the act To hold to the contrary would require the conclusion either that every contract, act, or combination of any kind or nature, whether it operated a restraint on trade or not, was within the statute, and thus the statute would be destructive of all right to contract or agree or combine in any respect whatever as to subjects embraced in interstate trade or commerce, or if this conclusion were not reached, then the contention would require it to be held that as the statute did not define the things to which it related and excluded resort to the only means by which the acts to which it relates could be ascertained—the light of reason—the enforcement of the statute was impossible because of its uncertainty. The merely generic enumeration which the statute makes of the acts to which it refers and the absence of any definition of restraint of trade as used in the statute leaves room for but one conclusion, which is that it was expressly designed not to unduly limit the application of the act by precise definition, but while clearly fixing a standard—that is, by defining the ulterior boundaries which could not be transgressed with impunity—to leave it to be determined by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute in every given case, whether any particular act or contract was within the contemplation of the statute.

But, it is said, persuasive as these views may be, they may not be here applied, because the previous decisions of this court have given to the statute a meaning which expressly excludes the construction which must result from the reasoning stated. The cases are United States *v.* Freight Association (166 U. S., 290) and United States *v.* Joint Traffic Association (171 U. S , 505). Both the cases involved the legality of combinations or associations of railroads engaged in interstate commerce for the purpose of controlling the conduct of the parties to the association or combination in many particulars. The association or combination was assailed in each case as being in violation of the statute. It was held that they were. It is undoubted that in the opinion in each case general language was made use of which, when separated from its context, would justify the conclusion that it was decided that reason could not be resorted to for the purpose of determining whether the acts complained of were within the statute. It is, however, also true that the nature and character of the contract or agreement in each case was fully referred to and suggestions as to their unreasonableness pointed out in order to indicate that they were within the prohibitions of the statute. As the cases cannot by any possible conception be treated as authoritative without the certitude that reason was resorted to for the purpose of deciding them, it follows as a matter of course that it must have been held by the light of reason, since the conclusion could not have been otherwise reached, that the assailed contracts or agreements were within the general enumeration of the statute, and that their operation and effect brought about the restraint of trade which the statute prohibited. This being inevitable, the deduction can, in reason, only be this: That in the cases relied upon it

having been found that the acts complained of were within the statute and operated to produce the injuries which the statute forbade, that resort to reason was not permissible in order to allow that to be done which the statute prohibited. This being true, the rulings in the cases relied upon, when rightly appreciated, were therefore this and nothing more: That as considering the contracts or agreements, their necessary effect and the character of the parties by whom they were made, they were clearly restraints of trade within the purview of the statute, they could not be taken out of that category by indulging in general reasoning as to the expediency or non-expediency of having made the contracts or the wisdom or want of wisdom of the statute which prohibited their being made. That is to say, the cases but decided that the nature and character of the contracts, creating as they did a conclusive presumption which brought them within the statute, such result was not to be disregarded by the substitution of a judicial appreciation of what the law ought to be for the plain judicial duty of enforcing the law as it was made.

But aside from reasoning it is true to say that the cases relied upon do not when rightly construed sustain the doctrine contended for is established by all of the numerous decisions of this court which have applied and enforced the antitrust act, since they all in the very nature of things rest upon the premise that reason was the guide by which the provisions of the act were in every case interpreted Indeed, intermediate the decision of the two cases—that is, after the decision in the freight association case and before the decision in the joint traffic case—the case of Hopkins *v* United States (171 U. S., 578) was decided, the opinion being delivered by Mr. Justice Peckham, who wrote both the

opinions in the freight association and in the joint traffic cases. And, referring in the Hopkins case to the broad claim made as to the rule of interpretation announced in the freight association case, it was said (p. 592):

> To treat as condemned by the act all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased would enlarge the application of the act far beyond the fair meaning of the language used. There must be some direct and immediate effect upon interstate commerce in order to come within the act.

And in the joint traffic case this statement was expressly reiterated and approved and illustrated by example, like limitation on the general language used in freight association and joint traffic cases is also the clear result of Bement *v.* National Harrow Co. (186 U. S., 70, 92), and especially of Cincinnati Packet Co. *v.* Bay (200 U. S., 179).

If the criterion by which it is to be determined in all cases whether every contract, combination, etc , is a restraint of trade within the intendment of the law, is the direct or indirect effect of the acts involved, then of course the rule of reason becomes the guide, and the construction which we have given the statute, instead of being refuted by the cases relied upon, is by those cases demonstrated to be correct. This is true, because as the construction which we have deduced from the history of the act and the analysis of its text is simply that in every case where it is claimed that an act or acts are in violation of the statute the rule of reason, in the light of the principles of law and the public policy which the act embodies, must be applied. From this it follows, since that rule and the result of the test as to direct or indirect, in their ultimate

aspect, come to one and the same thing, that the difference between the two is therefore only that which obtains between things which do not differ at all.

If it be true that there is this identity of result between the rule intended to be applied in the freight association case—that is, the rule of direct and indirect, and the rule of reason which, under the statute as we construe it, should be here applied—it may be asked how was it that in the opinion in the freight association case much consideration was given to the subject of whether the agreement or combination which was involved in that case could be taken out of the prohibitions of the statute upon the theory of its reasonableness? The question is pertinent and must be fully and frankly met, for if it be now deemed that the freight association case was mistakenly decided or too broadly stated, the doctrine which it announced should be either expressly overruled or limited.

The confusion which gives rise to the question results from failing to distinguish between the want of power to take a case which by its terms or the circumstances which surrounded it, considering among such circumstances the character of the parties, is plainly within the statute, out of the operation of the statute by resort to reason in effect to establish that the contract ought not to be treated as within the statute and the duty in every case where it becomes necessary from the nature and character of the parties to decide whether it was within the statute to pass upon that question by the light of reason. This distinction, we think, serves to point out what in its ultimate conception was the thought underlying the reference to the rule of reason made in the freight association case, especially when such reference is interpreted by the context of the opinion and in the light of the subse-

quent opinion in the Hopkins case and in Cincinnati Packet Co. *v.* Bay.

And in order, not in the slightest degree to be wanting in frankness, we say that in so far, however, as by separating the general language used in the opinions in the freight association and joint traffic cases from the context and the subject and parties with which the cases were concerned, it may be conceived that the language referred to conflicts with the construction which we give the statute, they are necessarily now limited and qualified. We see no possible escape from this conclusion if we are to adhere to the many cases decided in this court in which the antitrust law has been applied and enforced, and if the duty to apply and enforce that law in the future is to continue to exist. The first is true, because the construction which we now give the statute does not in the slightest degree conflict with a single previous case decided concerning the antitrust law aside from the contention as to the freight association and joint traffic cases, and because every one of those cases applied the rule of reason for the purpose of determining whether the subject before the court was within the statute. The second is also true, since, as we have already pointed out, unaided by the light of reason it is impossible to understand how the statute may in the future be enforced and the public policy which it establishes be made efficacious.

So far as the objections of the defendants in error are concerned, they are all embraced under two headings:

(*a*) That the act, even if the averments of the bill be true, cannot be constitutionally applied, because to do so would extend the power of Congress to subject dehors the reach of its authority to regulate commerce, by enabling that body to deal with mere questions of

production of commodities within the states. But all the structure upon which this argument proceeds is based upon the decision in United States *v.* E. C. Knight Co. (156 U. S., 1). The view, however, which the argument takes of that case and the arguments based upon that view have been so repeatedly pressed upon this court in connection with the interpretation and enforcement of the antitrust act, and have been so necessarily and expressly decided to be unsound, as to cause the contentions to be plainly foreclosed and to require no express notice. (United States *v.* Northern Securities Co., 193 U. S., 334; Loewe *v.* Lawler, 208 U. S., 274; United States *v.* Swift & Co., 196 U. S., 375; Montague *v.* Lowry, 193 U. S., 38; Shawnee Compress Co. *v.* Anderson, 209 U. S., 423.)

(*b*) Many arguments are pressed in various forms of statement which in substance amount to contending that the statute cannot be applied under the facts of this case without impairing rights of property and destroying the freedom of contract or trade, which is essentially necessary to the well-being of society and which it is insisted is protected by the constitutional guaranty of due process of law. But the ultimate foundation of all these arguments is the assumption that reason may not be resorted to in interpreting and applying the statute, and therefore that the statute unreasonably restricts the right to contract and unreasonably operates upon the right to acquire and hold property. As the premise is demonstrated to be unsound by the construction we have given the statute, of course the propositions which rest upon that premise need not be further noticed.

So far as the arguments proceed upon the conception that in view of the generality of the statute it is not susceptible of being enforced by the courts because

it cannot be carried out without a judicial exertion of legislative power, they are clearly unsound. The statute certainly generically enumerates the character of acts which it prohibits and the wrong which it was intended to prevent. The propositions therefore but insist that consistently with the fundamental principles of due process of law it never can be left to the judiciary to decide whether in a given case particular acts come within a generic statutory provision. But to reduce the propositions, however, to this their final meaning makes it clear that in substance they deny the existence of essential legislative authority and challenge the right of the judiciary to perform duties which that department of the Government has exerted from the beginning. This is so clear as to require no elaboration. Yet, let us demonstrate that which needs no demonstration by a few obvious examples. Take, for instance, the familiar cases where the judiciary is called upon to determine whether a particular act or acts are within a given prohibition, depending upon wrongful intent. Take questions of fraud. Consider the power which must be exercised in every case where the courts are called upon to determine whether particular acts are invalid which are, abstractly speaking, in and of themselves valid, but which are asserted to be invalid because of their direct effect upon interstate commerce.

From the American Tobacco Case

If the antitrust law is applicable to the entire situation here presented and is adequate to afford complete relief for the evils which the United States insists that situation presents, it can only be because that law will be given a more comprehensive application than has been affixed to it in any previous decision. This will

be the case because the undisputed facts as we have stated them involve questions as to the operation of the antitrust law not hitherto presented in any case. Thus, even if the ownership of stock by the American Tobacco Co. in the accessory and subsidiary companies and the ownership of stock in any of those companies among themselves were held, as was decided in the Standard Oil Co. case, to be a violation of the act and all relations resulting from such stock ownership were therefore set aside, the question would yet remain whether the principal defendant, the American Tobacco Co., and the five accessory defendants, even when divested of their stock ownership in other corporations, by virtue of the power which they would continue to possess, even although thus stripped, would amount to a violation of both the first and second sections of the act. Again, if it were held that the corporations, the existence whereof was due to a combination between such companies and other companies was a violation of the act, the question would remain whether such of the companies as did not owe their existence and power to combinations, but whose power alone arose from the exercise of the right to acquire and own property, would be amenable to the prohibitions of the act. Yet, further, even if this proposition was held in the affirmative, the question would remain whether the principal defendant, the American Tobacco Co., when stripped of its stock ownership, would be in and of itself within the prohibitions of the act, although that company was organized and took being before the antitrust act was passed. Still further, the question would yet remain whether particular corporations which, when bereft of the power which they possessed as resulting from stock ownership, although they were not inherently possessed of a sufficient residuum of power

to cause them to be in and of themselves either a restraint of trade or a monopolization or an attempt to monopolize, should nevertheless be restrained because of their intimate connection and association with other corporations found to be within the prohibitions of the act. The necessity of relief as to all these aspects, we think, seemed to the Government so essential, and the difficulty of giving to the act such a comprehensive and coherent construction as would be adequate to enable it to meet the entire situation, led to what appears to us to be in their essence a resort to methods of construction not compatible one with the other. And the same apparent conflict is presented by the views of the act taken by the defendants when their contentions are accurately tested.

Thus the Government, for the purpose of fixing the illegal character of the original combination which organized the old American Tobacco Co., asserts that the illegal character of the combination is plainly shown because the combination was brought about to stay the progress of a flagrant and ruinous trade war.

In other words, the contention is that as the act forbids every contract and combination it hence prohibits a reasonable and just agreement made for the purpose of ending a trade war. But as thus construing the act by the rule of the letter which kills would necessarily operate to take out of the reach of the act some of the accessory and many subsidiary corporations, the existence of which depend not at all upon combination or agreement or contract, but upon mere purchases of property, it is insisted in many forms of argument that the rule of construction to be applied must be the spirit and intent of the act, and therefore its prohibitions must be held to extend to acts even if not within the literal terms of the statute if they are within its

spirit, because done with an intent to bring about the harmful results which it was the purpose of the statute to prohibit. So as to the defendants. While it is argued on the one hand that the forms by which various properties were acquired in view of the letter of the act exclude many of the assailed transactions from condemnation, it is yet urged that giving to the act the broad construction which it should rightfully receive, whatever may be the form, no condemnation should follow, because looking at the case as a whole every act assailed is shown to have been but a legitimate and lawful result of the exertion of honest business methods brought into play for the purpose of advancing trade instead of with the object of obstructing and restraining the same. But the difficulties which arise, from the complexity of the particular dealings which are here involved and the situation which they produce, we think grows out of a plain misconception of both the letter and spirit of the antitrust act We say of the letter, because while seeking by a narrow rule of the letter to include things which it is deemed would otherwise be excluded the contention really destroys the great purpose of the act, since it renders it impossible to apply the law to a multitude of wrongful acts, which would come within the scope of its remedial purposes by resort to a reasonable construction, although they would not be within its reach by a too narrow and unreasonable adherence to the strict letter. This must be the case unless it be possible in reason to say that for the purpose of including one class of acts which would not otherwise be embraced a literal construction, although in conflict with reason, must be applied, and for the purpose of including other acts which would not otherwise be embraced a reasonable construction must be resorted to. That is to say, two conflicting rules of

construction must at one and the same time be applied and adhered to.

The obscurity and resulting uncertainty, however, is now but an abstraction, because it has been removed by the consideration which we have given quite recently to the construction of the antitrust act in the Standard Oil case. In that case it was held, without departing from any previous decision of the court, that as the statute had not defined the words "restraint of trade," it became necessary to construe those words, a duty which could only be discharged by a resort to reason. We say the doctrine thus stated was in accord with all the previous decisions of this court, despite the fact that the contrary view was sometimes erroneously attributed to some of the expressions used in two prior decisions. (Trans-Missouri Freight Association and Joint Traffic cases, 166 U. S., 290, and 171 U. S., 505) That such view was a mistaken one was fully pointed out in the Standard Oil case and is additionally shown by a passage in the opinion in the Joint Traffic case, as follows (171 U S., 568): "The act of Congress must have a reasonable construction or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing on interstate commerce, and possibly to restrain it." Applying the rule of reason to the construction of the statute, it was held in the Standard Oil case that as the words "restraint of trade" at common law and in the law of this country at the time of the adoption of the antitrust act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of

the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance. It was therefore pointed out that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose.

In other words, it was held not that acts which the statute prohibited could be removed from the control of its prohibitions by a finding that they were reasonable, but that the duty to interpret which inevitably arose from the general character of the term "restraint of trade," required that the words "restraint of trade" should be given a meaning which would not destroy the individual right to contract and render difficult if not impossible any movement of trade in the channels of interstate commerce—the free movement of which it was the purpose of the statute to protect. The soundness of the rule that the statute should receive a reasonable construction, after further mature deliberation, we see no reason to doubt. Indeed, the necessity for not departing in this case from the standard of the rule of reason which is universal in this application is so plainly required in order to give effect to the remedial purposes which the act under consideration contemplates, and to prevent that act from destroying all liberty of contract and all substantial right to trade, and thus causing the act to be at war with itself by annihilating the fundamental right of freedom to trade which, on the very face of the act, it was enacted to preserve, is illustrated by the record before us. In truth, the plain demonstration which this record gives of the injury which would arise from and the promotion of the wrongs which the statute was intended to guard

against which would result from giving to the statute a narrow, unreasoning, and unheard of construction, as illustrated by the record before us, if possible serves to strengthen our conviction as to the correctness of the rule of construction, the rule of reason, which was applied in the Standard Oil case, the application of which rule to the statute we now, in the most unequivocal terms, re-express and reaffirm.

Coming then to apply to the case before us the act as interpreted in the Standard Oil and previous cases, all the difficulties suggested by the mere form in which the assailed transactions are clothed become of no moment. This follows because, although it was held in the Standard Oil case that, giving to the statute a reasonable construction, the words "restraint of trade" did not embrace all those normal and usual contracts essential to individual freedom and the right to make which were necessary in order that the course of trade might be free, yet, as a result of the reasonable construction which was affixed to the statute, it was pointed out that the generic designation of the first and second sections of the law, when taken together, embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed. That is to say, it was held that in view of the general language of the statute and the public policy which it manifested, there was no possibility of frustrating that policy by resorting to any disguise or subterfuge of form, since resort to reason rendered it impossible to escape by any indirection the prohibitions of the statute.

Considering, then, the undisputed facts which we have previously stated, it remains only to determine whether they establish that the acts, contracts, agree-

ments, combinations, etc , which were assailed were of such an unusual and wrongful character as to bring them within the prohibitions of the law. That they were, in our opinion, so overwhelmingly, results from the undisputed facts that it seems only necessary to refer to the facts as we have stated them to demonstrate the correctness of this conclusion. Indeed, the history of the combination is so replete with the doing of acts which it was the obvious purpose of the statute to forbid, so demonstrative of the existence from the beginning of a purpose to acquire dominion and control of the tobacco trade, not by the mere exertion of the ordinary right to contract and to trade, but by methods devised in order to monopolize the trade by driving competitors out of business, which were ruthlessly carried out upon the assumption that to work upon the fears or play upon the cupidity of competitors would make success possible. We say these conclusions are inevitable, not because of the vast amount of property aggregated by the combination, not because alone of the many corporations which the proof shows were united by resort to one device or another. Again, not alone because of the dominion and control over the tobacco trade which actually exists, but because we think the conclusion of wrongful purpose and illegal combination is overwhelmingly established by the following considerations·

(*a*) By the fact that the very first organization or combination was impelled by a previously existing fierce trade war, evidently inspired by one or more of the minds which brought about and became parties to that combination.

(*b*) Because, immediately after that combination and the increase of capital which followed, the acts which ensued justify the inference that the intention existed

to use the power of the combination as a vantage ground to further monopolize the trade in tobacco by means of trade conflicts designed to injure others, either by driving competitors out of the business or compelling them to become parties to a combination—a purpose whose execution was illustrated by the plug war which ensued and its results, by the snuff war which followed and its results, and by the conflicts which immediately followed the entry of the combination in England and the division of the world's business by the two foreign contracts which ensued.

(*c*) By the ever-present manifestation which is exhibited of a conscious wrongdoing by the form in which the various transactions were embodied from the beginning, ever changing but ever in substance the same. Now the organization of a new company, now the control exerted by the taking of stock in one or another or in several, so as to obscure the result actually attained, nevertheless uniform, in their manifestations of the purpose to restrain others and to monopolize and retain power in the hands of the few who, it would seem, from the beginning contemplated the mastery of the trade which practically followed.

(*d*) By the gradual absorption of control over all the elements essential to the successful manufacture of tobacco products, and placing such control in the hands of seemingly independent corporations serving as perpetual barriers to the entry of others into the tobacco trade.

(*e*) By persistent expenditure of millions upon millions of dollars in buying out plants, not for the purpose of utilizing them, but in order to close them up and render them useless for the purposes of trade.

(*f*) By the constantly recurring stipulations, whose legality, isolatedly viewed, we are not considering, by

which numbers of persons, whether manufacturers, stockholders or employees, were required to bind themselves, generally for long periods, not to compete in the future. Indeed, when the results of the undisputed proof which we have stated are fully apprehended, and the wrongful acts which they exhibit are considered, there comes inevitably to the mind the conviction that it was the danger which it was deemed would arise to individual liberty and the public well-being from acts like those which this record exhibits, which led the legislative mind to conceive and to enact the antitrust act, considerations which also serve to clearly demonstrate that the combination here assailed is within the law as to leave no doubt that it is our plain duty to apply its prohibitions.

In stating summarily, as we have done, the conclusions which, in our opinion, are plainly deducible from the undisputed facts, we have not paused to give the reasons why we consider, after great consideration, that the elaborate arguments advanced to affix a different complexion to the case are wholly devoid of merit. We do not, for the sake of brevity, moreover, stop to examine and discuss the various propositions urged in the argument at bar for the purpose of demonstrating that the subject matter of the combination which we find to exist and the combination itself are not within the scope of the antitrust law, because when rightly considered they are merely matters of intrastate commerce, and therefore subject alone to state control. We have done this because the want of merit in all the arguments advanced on such subjects is so completely established by the prior decisions of this court, as pointed out in the Standard Oil case, as not to require restatement.

Leading as this does to the conclusion that the as-

sailed combination in all its aspects—that is to say, whether it be looked at from the point of view of stock ownership or from the standpoint of the principal corporation and the accessory or subsidiary corporations viewed independently, including the foreign corporations in so far as by the contracts made by them they became co-operators in the combination—comes within the prohibitions of the first and second sections of the antitrust act, it remains only finally to consider the remedy which it is our duty to apply to the situation thus found to exist.

APPENDIX B

THE DISSENTING OPINION OF JUSTICE HARLAN IN THE STANDARD OIL CASE

MR. JUSTICE HARLAN, concurring in part and dissenting in part:

A sense of duty constrains me to express the objections which I have to certain declarations in the opinion just delivered on behalf of the court.

I concur in holding that the Standard Oil Co. of New Jersey and its subsidiary companies constitute a combination in restraint of interstate commerce, and that they have attempted to monopolize and have monopolized parts of such commerce—all in violation of what is known as the antitrust act of 1890. (26 Stat , 209, c. 647.) The evidence in this case overwhelmingly sustained that view and led the circuit court, by its final decree, to order the dissolution of the New Jersey corporation and the discontinuance of the illegal combination between that corporation and its subsidiary companies.

In my judgment, the decree below should have been affirmed without qualification. But the court, while affirming the decree, directs some modifications in respect of what it characterizes as "minor matters." It is to be apprehended that those modifications may prove to be mischievous. In saying this I have particularly in view the statement in the opinion that "it

does not necessarily follow that because an illegal restraint of trade or an attempt to monopolize or a monopolization resulted from the combination and the transfer of the stocks of the subsidiary corporations to the New Jersey corporation, that a like restraint of trade or attempt to monopolize or monopolization would necessarily arise from agreements between one or more of the subsidiary corporations after the transfer of the stock by the New Jersey corporation." Taking this language, in connection with other parts of the opinion, the subsidiary companies are thus, in effect, informed—unwisely, I think—that, although the New Jersey corporation, being an illegal combination, must go out of existence, *they* may join in an agreement *to restrain commerce* among the states if such restraint be not "undue."

In order that my objection to certain parts of the court's opinion may distinctly appear, I must state the circumstances under which Congress passed the anti-trust act and trace the course of judicial decisions as to its meaning and scope. This is the more necessary because the court, by its decision, when interpreted by the language of its opinion, has not only upset the long-settled interpretation of the act, but has usurped the constitutional functions of the legislative branch of the Government. With all due respect for the opinions of others, I feel bound to say that what the court has said may well cause some alarm for the integrity of our institutions. Let us see how the matter stands.

All who recall the condition of the country in 1890 will remember that there was everywhere among the people generally a deep feeling of unrest. The nation had been rid of human slavery—fortunately, as all now feel—but the conviction was universal that the country was in real danger from another kind of slav-

ery sought to be fastened on the American people, namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessaries of life. Such a danger was thought to be then imminent, and all felt that it must be met firmly and by such statutory regulations as would adequately protect the people against oppression and wrong. Congress therefore took up the matter and gave the whole subject the fullest consideration. All agreed that the National Government could not, by legislation, regulate the domestic trade carried on wholly within the several states; for power to regulate such trade remained with, because never surrendered by, the states. But, under authority expressly granted to it by the Constitution, Congress could regulate commerce among the several states and with foreign states. Its authority to such commerce was and is paramount, due force being given to other provisions of the fundamental law devised by the fathers for the safety of the Government and for the protection and security of the essential rights inhering in life, liberty, and property.

Guided by these considerations, and to the end that the people, *so far as interstate commerce*[1] was concerned, might not be dominated by vast combinations and monopolies, having power to advance their own selfish ends, regardless of the general interests and welfare, Congress passed the antitrust act of 1890 (see Appendix C).

. . . . . .

The important inquiry in the present case is as to

[1] All italics are Justice Harlan's.

the meaning and scope of that act in its application to interstate commerce

In 1896 this court had occasion to determine the meaning and scope of the act in an important case known as the Trans-Missouri Freight case. (166 U. S., 290.) The question there was as to the validity under the antitrust act of a certain agreement between numerous railroad companies, whereby they formed an association for the purpose of establishing and maintaining rates, rules, and regulations in respect of freight traffic over specified routes. Two questions were involved. First, whether the act applied to railroad carriers; second, whether the agreement which was the basis of the suit which the United States brought to have the agreement annulled was illegal. The court held that railroad carriers were embraced by the act In determining that question the court, among other things, said:

> The language of the act includes *every* contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations So far as the very terms of the statute go, they apply to *any* contract of the nature described A contract therefore that is in restraint of trade or commerce is by the strict language of the act prohibited, even though such contract is entered into between competing common carriers by railroad, and only for the purposes of thereby affecting traffic rates for the transportation of persons and property. If such an agreement restrains trade or commerce, it is prohibited by the statute, unless it can be said that an agreement, no matter what its terms, relating only to transportation cannot restrain trade or commerce. We see no escape from the conclusion that if an agreement of such a nature does restrain it the agreement is condemned by this act. . . . Nor is it for the substantial interests of the country that any one commodity should be within the sole power and subject to the sole will of one powerful combination of capital. Congress has, so far as its jurisdiction

extends, prohibited *all* contracts or combinations in the form of trusts entered into for the purpose of restraining trade and commerce. . . . While the statute prohibits all combinations in the form of trusts or otherwise, the limitation is not confined to that form alone. *All* combinations which are *in restraint of trade or commerce* are prohibited, whether in the form of trusts or *in any other form whatever.* (U. S. *v.* Freight Asso., 166 U. S., 290, 312, 324, 326.)

The court then proceeded to consider the second of the above questions, saying.

The next question to be discussed is as to what is the true construction of the statute, assuming that it applies to common carriers by railroad. What is the meaning of the language as used in the statute, that "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal"? Is it confined to a contract or combination which is only in unreasonable restraint of trade or commerce, or does it include what the language of the act plainly and in terms covers, all contracts of that nature? It is now with much amplification of argument urged that the statute, in declaring illegal every combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce does not mean what the language used therein plainly imports, but that it only means to declare illegal any such contract which is in *unreasonable* restraint of trade, while leaving all others unaffected by the provisions of the act, that the common-law meaning of the term "contract in restraint of trade" includes only such contracts as are in *unreasonable* restraint of trade, and when that term is used in the Federal statute it is not intended to include all contracts in restraint of trade, but only those which are in unreasonable restraint thereof. . . . By the simple use of the term "contract in restraint of trade," *all* contracts of that nature, whether valid or otherwise, would be included, and *not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade.* When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several states,

etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but *all* contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress . . . If only that kind of contract which is in unreasonable restraint of trade be within the meaning of the statute, and declared therein to be illegal, it is at once apparent that the subject of what is a reasonable rate is attended with great uncertainty. . . . To say, therefore, that the act excludes agreements which are not in unreasonable restraint of trade, and which tend simply to keep up reasonable rates for transportation, is substantially to leave the question of unreasonableness to the companies themselves. . . . But assuming that agreements of this nature are not void at common law and that the various cases cited by the learned courts below show it, the answer to the statement of their validity now is to be found *in the terms of the statute* under consideration. . . The arguments which have been addressed to us against the inclusion of all contracts in restraint of trade, as provided for by the language of the act, have been based upon the alleged presumption that Congress, notwithstanding the language of the act, could not have intended to embrace all contracts, but only such contracts as were in unreasonable restraint of trade. Under these circumstances we are, therefore, asked to hold that the act of Congress excepts contracts which are not in unreasonable restraint of trade, and which only keep rates up to a reasonable price, notwithstanding the language of the act makes no such exception. In other words, we are asked to read into the act *by way of judicial legislation an exception that is not placed there by the lawmaking branch of the Government*, and this is to be done upon the theory that the impolicy of such legislation is so clear that it cannot be supposed Congress intended the natural import of the language it used. This *we cannot and ought not to do*. . . .

If the act ought to read, as contended for by defendants, *Congress is the body to amend it and not this court, by a process of judicial legislation wholly unjustifiable*. Large numbers do not agree that the view taken by defendants is sound or true in substance, and Congress may and very probably did share in that belief in passing the act. The public policy of the Government is to be found *in its statutes*, and

when they have not directly spoken, then in the decisions of the courts and the constant practice of the Government officials; but when the lawmaking power speaks upon a particular subject, over which it has constitutional power to legislate, *public policy in such a case is what the statute enacts.* If the law prohibit any contract or combination in restraint of trade or commerce, a contract or combination made in violation of such law is void, whatever may have been theretofore decided by the courts to have been the public policy of the country on that subject. The conclusion which we have drawn from the examination above made into the question before us is that the antitrust act applies to railroads, and that it renders illegal *all* agreements which are *in restraint* of trade or commerce as we have above defined that expression, and the question then arises whether the agreement before us is of that nature.

I have made these extended extracts from the opinion of the court in the Trans-Missouri Freight case in order to show beyond question that the point was there urged by counsel that the antitrust act condemned *only* contracts, combinations, trusts, and conspiracies that were in *unreasonable* restraint of interstate commerce, and that the court in clear and decisive language met that point. It adjudged that Congress had in unequivocal words declared that "*every* contract, combination, in the form of trust or otherwise, or conspiracy in restraint of commerce among the several states" shall be illegal, and that no distinction, *so far as interstate commerce was concerned,* was to be tolerated between restraints of such commerce as were undue or unreasonable and restraints that were due or reasonable. With full knowledge of the then condition of the country and of its business, Congress determined to meet, and did meet, the situation by an absolute, statutory prohibition of "*every* contract, combination, in the form of trust or otherwise, in restraint of trade or commerce." Still more, in response to the suggestion by

able counsel that Congress intended only to strike down such contracts, combinations, and monopolies as unreasonably restrained interstate commerce, this court, in words too clear to be misunderstood, said that to so hold was "to read into the act by way of *judicial legislation*, an exception not placed there by the law-making branch of the Government." "This," the court said, as we have seen "*we cannot* and *ought not* to do."

It thus appears that fifteen years ago, when the purpose of Congress in passing the antitrust act was fresh in the minds of courts, lawyers, statesmen, and the general public, this court expressly declined to indulge in judicial legislation, by inserting in the act the word "unreasonable" or any other word of like import. It may be stated here that the country at large accepted this view of the act, and the Federal courts throughout the entire country enforced its provisions according to the interpretation given in the Freight Association case. What, then, was to be done by those who questioned the soundness of the interpretation placed on the act by this court in that case? As the court had decided that to insert the word "unreasonable" in the act would be "judicial legislation" on its part, the only alternative left to those who opposed the decision in that case was to induce Congress to so *amend* the act as to recognize the right to restrain interstate commerce to a *reasonable* extent. The public press, magazines, and law journals, the debates in Congress, speeches and addresses by public men and jurists, all contain abundant evidence of the general understanding that the meaning, extent, and scope of the antitrust act had been judicially determined by this court, and that the only question remaining open for discussion was the wisdom of the policy declared by the act—a

matter that was exclusively within the cognizance of Congress. But at every session of Congress since the decision of 1896, the lawmaking branch of the Government, with full knowledge of that decision, has refused to change the policy it had declared or to so amend the act of 1890 as to except from its operation contracts, combinations, and trusts that *reasonably* restrain interstate commerce.

But those who were in combinations that were illegal did not despair. They at once set up the baseless claim that the decision of 1896 disturbed the "business interests of the country," and let it be known that they would never be content until the rule was established that would permit interstate commerce to be subjected to *reasonable* restraints. Finally, an opportunity came again to raise the same question which this court had, upon full consideration, determined in 1896. I now allude to the case of United States *v.* Joint Traffic Association, 171 U. S., 505, decided in 1898. What was that case?

It was a suit by the United States against more than thirty railroad companies to have the court declare illegal, under the antitrust act, a certain agreement between these companies. The relief asked was denied in the subordinate Federal courts and the Government brought the case here.

It is important to state the points urged in that case by the defendant companies charged with violating the antitrust act, and to show that the court promptly met them. To that end I make a copious extract from the opinion in the Joint Traffic case. Among other things, the court said:

> Upon comparing that agreement [the one in the Joint Traffic case, then under consideration, 171 U. S., 505] with the one set forth in the case of United States *v.* Trans-

Missouri Freight Association, 166 U. S., 290, the great similarity between them suggests that a similar result should be reached in the two cases (p. 558).

Learned counsel in the Joint Traffic case urged a reconsideration of the question decided in the Trans-Missouri case, contending that "the decision in that case [the Trans-Missouri Freight case] is quite plainly erroneous, and the consequences of such error are far-reaching and disastrous and clearly at war with justice and sound policy, and the construction placed upon the antitrust statute has been received by the public with surprise and alarm." They suggested that the point made in the Joint Traffic case as to the meaning and scope of the act might have been but was not made in the previous case. The court said (171 U. S., 559) that "the report of the Trans-Missouri case clearly shows not only that the point now taken *was* there urged upon the attention of the court, but it was then *intentionally* and *necessarily* decided."

The question whether the court should again consider the point decided in the Trans-Missouri case was disposed of in the most decisive language as follows:

> Finally, we are asked to reconsider the question decided in the Trans-Missouri case, and to retrace the steps taken therein, because of the plain error contained in that decision and the widespread alarm with which it was received and the serious consequences which have resulted, or may soon result, from the law as interpreted in that case. It is proper to remark that an application for a reconsideration of a question but lately decided by this court is usually based upon a statement that some of the arguments employed on the original hearing of the question have been overlooked or misunderstood, or that some controlling authority has been either misapplied by the court or passed over without discussion or notice. While this is not strictly an application for a rehearing in the same case, yet in substance it is the

same thing. The court is asked to reconsider a question but just decided after a careful investigation of the matter involved. There have heretofore been in effect two arguments of precisely the same questions now before the court, and the same arguments were addressed to us on both those occasions. The report of the Trans-Missouri case shows a dissenting opinion delivered in that case, and that the opinion was concurred in by three other members of the court. That opinion, it will be seen, gives with great force and ability the arguments against the decision which was finally arrived at by the court. It was after a full discussion of the questions involved and with the knowledge of the views entertained by the minority, as expressed in the dissenting opinion, that the majority of the court came to the conclusion it did. Soon after the decision a petition for a rehearing of the case was made, supported by a printed argument in its favor, and pressed with an earnestness and vigor and at a length which were certainly commensurate with the importance of the case. This court, *with care and deliberation* and also with a full appreciation of their importance, again considered the questions involved in its former decision. A majority of the court once more arrived at the conclusion it had first announced, and accordingly it denied the application. And now *for the third time* the same arguments are employed, and the court is again asked to recant its former opinion, and to decide the same question in direct opposition to the conclusion arrived at in the Trans-Missouri case. The learned counsel while making the application frankly confess that the argument in opposition to the decision in the case above named has been so fully, so clearly, and so forcibly presented in the dissenting opinion of Mr Justice White [in the Freight case] that it is hardly possible to add to it, nor is it necessary to repeat it. The fact that there was so close a division of opinion in this court when the matter was first under advisement, together with the different views taken by some of the judges of the lower courts, led us to the most careful and scrutinizing examination of the arguments advanced by both sides, and it was after such an examination that the majority of the court came to the conclusion it did It is not now alleged that the court on the former occasion overlooked any argument for the respondents or misapplied any controlling authority. It is simply insisted that the court, notwithstanding the arguments for an oppo-

site view, arrived at an erroneous result which, for reasons already stated, ought to be reconsidered and reversed. *As we have twice already deliberately and earnestly considered the same arguments which are now for a third time pressed upon our attention,* it could hardly be expected that our opinion should now change from that already expressed.

These utterances, taken in connection with what was previously said in the Trans-Missouri Freight case, show so clearly and affirmatively as to admit of no doubt that this court many years ago, upon the fullest consideration, interpreted the antitrust act as prohibiting and making illegal not only *every* contract or combination, in whatever form, which was in restraint of interstate commerce, without regard to its reasonableness or unreasonableness, but all monopolies or attempt to monopolize "any part" of such trade or commerce.

. . . . . .

In the opinion delivered on behalf of the minority in the Northern Securities case (193 U. S.) our present Chief Justice referred to the contentions made by the defendants in the Freight Association case, namely, one of which was that the agreement there involved did not unreasonably restrain interstate commerce, and said:

> Both these contentions were decided against the association, the court holding that the antitrust act did embrace interstate carriage by railroad corporations, and as that act prohibited *any* contract in restraint of interstate commerce, *it hence embraced all contracts of that character, whether they were reasonable or unreasonable.*

One of the justices who dissented in the Northern Securities case in a separate opinion, concurred in by the minority, thus referred to the freight and joint traffic cases:

For it cannot be too carefully remembered that that clause applies to "every" contract of the forbidden kind—a consideration which was the turning point of the Trans-Missouri Freight Association case. . . . Size has nothing to do with the matter A monopoly of "any part" of commerce among the states is unlawful.

. . . . . .

After what has been adjudged, upon full consideration, as to the meaning and scope of the antitrust act, and in view of the usages of this court when attorneys for litigants have attempted to reopen questions that have been deliberately decided, I confess to no little surprise as to what has occurred in the present case The court says that the previous cases, above cited, "cannot by any possible conception be treated as authoritative without the certitude that *reason* was resorted to for the purpose of deciding them." And its opinion is full of intimations that this court proceeded in those cases, so far as the present question is concerned, without being guided by the "rule of reason" or "the light of reason." It is more than once intimated, if not suggested, that if the antitrust act is to be construed as prohibiting *every* contract or combination, of whatever nature, which is in fact in restraint of commerce, regardless of the reasonableness or unreasonableness of such restraint, that fact would show that the court had not proceeded, in its decision, according to "the light of reason," but had disregarded the "rule of reason." If the court, in those cases, was wrong in its construction of the act, it is certain that it fully apprehended the views advanced by learned counsel in previous cases and pronounced them to be untenable The published reports place this beyond all question. The opinion of the court was delivered by a justice of wide experience as a judicial officer, and the court had before it the Attorney-General of the

United States and lawyers who were recognized on all sides as great leaders in their profession. The same eminent jurist who delivered the opinion in the Trans-Missouri case delivered the opinion in the Joint Traffic case, while the association in the latter case was represented by lawyers whose ability was universally recognized Is it to be supposed that any point escaped notice in those cases when we think of the sagacity of the justice who expressed the views of the court or of the ability of the profound, astute lawyers, who sought such an interpretation of the act as would compel the court to insert words in the statute which Congress had not put there, and the insertion of which words would amount to "judicial legislation"? Now, this court is asked to do that which it has distinctly declared it could not and would not do, and has now done what it then said it could not constitutionally do It has by mere interpretation modified the act of Congress and deprived it of practical value as a defensive measure against the evils to be remedied On reading the opinion just delivered the first inquiry will be that as the court is unanimous in holding that the particular things done by the Standard Oil Co and its subsidiary companies in this case were illegal under the antitrust act, whether those things were in reasonable or unreasonable restraint of interstate commerce, why was it necessary to make an elaborate argument, as is done in the opinion, to show that, according to the "rule of reason," the act as passed by Congress should be interpreted as if it contained the word "unreasonable" or the word "undue"? The only answer which in frankness can be given to this question is that the court intends to decide that its deliberate judgment fifteen years ago, to the effect that the act permitted no restraint whatever of interstate commerce, whether reasonable

or unreasonable, was not in accordance with the "rule of reason" In effect the court says that it will now for the first time bring the discussion under the "light of reason" and apply the "rule of reason" to the questions to be decided. I have the authority of this court for saying that such a course of proceeding on its part would be "judicial legislation."

Still more, what is now done involves a serious departure from the settled usages of this court. Counsel have not ordinarily been allowed to discuss questions already settled by previous decisions. More than once at the present term that rule has been applied. In St. Louis, I M. & S. Ry. Co. *v.* Taylor (210 U. S., 281) the court had occasion to determine the meaning and scope of the original safety appliance act of Congress passed for the protection of railroad employees and passengers on interstate trains. (27 Stat , 531.) A particular construction of that act was insisted upon by the interstate carrier which was sued under the safety-appliance act; and the contention was that a different construction than the one insisted upon by the carrier would be a harsh one After quoting the words of the act, Mr. Justice Moody said for the court:

> There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the legislature was *to supplant the qualified duty of the common law with an absolute duty deemed by it more just.* If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it. It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. *They have no responsibility for the justice or wisdom of legislation and no duty except to enforce*

the law as it is written, unless it is clearly beyond the constitutional power of the lawmaking body. . . . It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are in the main helpless in that regard Such a policy would be intelligible, and, to say the least, not so unreasonable as to require us to doubt that it was intended and to seek some unnatural interpretation of common words. We see no error in this part of the case.

And at the present term of this court we were asked, in a case arising under the safety-appliance act, to reconsider the question decided in the Taylor case. We declined to do so, saying, in an opinion just now handed down:

In view of these facts, we are unwilling to regard the question as to the meaning and scope of the safety-appliance act, so far as it relates to automatic couplers on trains moving interstate traffic, as open to further discussion here. *If the court was wrong in the Taylor case the way is open for such an amendment of the statute as Congress may, in its discretion, deem proper.* This court ought not now disturb what has been so widely accepted and acted upon by the courts as having been decided in that case. A contrary course would cause infinite uncertainty, if not mischief, in the administration of the law in the Federal courts. To avoid misapprehension, it is appropriate to say that we are not to be understood as questioning the soundness of the interpretation heretofore placed by this court upon the safety-appliance act. We only mean to say that until Congress, by an amendment of the statute, changes the rule announced in the Taylor case, this court will adhere to and apply that rule. (C. B. & Q Ry Co. *v.* United States, 220 U. S.)

When counsel in the present case insisted upon a reversal of the former rulings of this court, and asked such an interpretation of the antitrust act as would

allow reasonable restraints of interstate commerce, this court, in deference to established practice, should, I submit, have said to them:

> That question, according to our practice, is not open for further discussion here. This court long ago deliberately held (1) that the act, interpreting its words in their ordinary acceptation, prohibits *all* restraints of interstate commerce by combinations in whatever form, and whether reasonable or unreasonable; (2) the question relates to matters of public policy in reference to commerce among the states and with foreign nations, and Congress alone can deal with the subject; (3) this court would encroach upon the authority of Congress if, under the guise of construction, it should assume to determine a matter of public policy, (4) the parties must go to Congress and obtain an amendment of the antitrust act if they think this court was wrong in its former decisions; and (5) this court cannot and will not *judicially legislate*, since its function is to declare the law, while it belongs to the legislative department to make the law. Such a course, I am sure, would not have offended the "rule of reason"

But my brethren, in their wisdom, have deemed it best to pursue a different course They have now said to those who condemn our former decisions and who object to all legislative prohibitions of contracts, combinations, and trusts in restraint of interstate commerce, "You may *now* restrain such commerce, provided you are reasonable about it; only take care that the restraint is not undue." The disposition of the case under consideration, according to the views of the defendants, will, it is claimed, quiet and give rest to "the business of the country." On the contrary, I have a strong conviction that it will throw the business of the country into confusion and invite widely extended and harassing litigation, the injurious effects of which will be felt for many years to come. When Congress prohibited *every* contract, combination, or

monopoly in restraint of commerce, it prescribed a simple, definite rule that all could understand, and which could be easily applied by every one wishing to obey the law and not to conduct their business in violation of law. But now, it is to be feared, we are to have, in cases without number, the constantly recurring inquiry—difficult to solve by proof—whether the particular contract, combination, or trust involved in each case is or is not an "unreasonable" or "undue" restraint of trade. Congress, in effect, said that there should be *no* restraint of trade, *in any form*, and this court solemnly adjudged many years ago that Congress meant what it thus said in clear and explicit words, and that it *could not* add to the words of the act. But those who condemn the action of Congress are now, in effect, informed that the courts will allow such restraints of interstate commerce as are shown not to be unreasonable or undue.

It remains for me to refer more fully than I have heretofore done, to another, and, in my judgment—if we look to the future—the most important aspect of this case That aspect concerns the usurpation by the judicial branch of the Government of the functions of the legislative department. The illustrious men who laid the foundations of our institutions deemed no part of the National Constitution of more consequence or more essential to the permanency of our form of government than the provisions under which were distributed the powers of government among three separate, equal, and co-ordinate departments—legislative, executive, and judicial. This was at that time a new feature of governmental regulation among the nations of the earth, and, it is deemed by the people of every section of our own country as most vital in the workings of a representative Republic whose Constitution was

ordained and established in order to accomplish the objects stated in its preamble by the means, *but only by the means*, provided either expressly or by necessary implication, by the instrument itself. No department of that Government can constitutionally exercise the powers committed strictly to another and separate department.

I said at the outset that the action of the court in this case might well alarm thoughtful men who revered the Constitution. I meant by this that many things are intimated and said in the court's opinion which will not be regarded otherwise than as sanctioning an invasion by the judiciary of the constitutional domain of Congress—an attempt by interpretation to soften or modify what some regard as a harsh public policy. This court, let me repeat, solemnly adjudged many years ago that it could not, except by "*judicial legislation*," read words into the antitrust act not put there by Congress, and which, being inserted, give it a meaning which the words of the act, as passed, if properly interpreted, would not justify. The court has decided that it could not thus change a public policy formulated and declared by Congress, that Congress has paramount authority to regulate interstate commerce, and that it alone can change a policy once inaugurated by legislation The courts have nothing to do with the wisdom or policy of an act of Congress. Their duty is to ascertain the will of Congress, and if the statute embodying the expression of that will is constitutional, the courts must respect it. They have no function to declare a public policy, nor to *amend* legislative enactments. "What is termed the policy of the Government with reference to any particular legislation," as this court has said, "is generally a very uncertain thing, upon which all sorts of opinions, each

variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes" (Hadden *v.* Collector, 5 Wall., 107). Nevertheless, if I do not misapprehend its opinion, the court has now read into the act of Congress words which are not to be found there, and has thereby done that which it adjudged in 1896 and 1898 could not be done without violating the Constitution, namely, by interpretation of a statute changed a public policy declared by the legislative department.

. . . . . .

For the reasons stated, while concurring in the general affirmance of the decree of the circuit court, I dissent from that part of the judgment of this court which directs the modification of the decree of the circuit court, as well as from those parts of the opinion which, in effect, assert authority, in this court, to insert words in the antitrust act which Congress did not put there, and which, being inserted, Congress is made to declare, as part of the public policy of the country, what it has not chosen to declare.

APPENDIX C

THE SHERMAN ANTITRUST ACT

An act to protect trade and commerce against unlawful restraints and monopolies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia, and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petitions setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

SEC 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that

other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which court is held or not; and subpœnas to that end may be served in any district by the marshal thereof.

SEC. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one state to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

SEC. 8. That the word "person," or "persons," wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any state, or the laws of any foreign country.

Approved, July 2, 1890.

APPENDIX D

THE ALDRICH PLAN FOR MONETARY LEGISLATION

Origin and Status

The so-called Aldrich Plan submitted to the National Monetary Commission on the 16th of January, 1911, has awakened more extended comment than any other proposition relating to our banking system in recent years. Thus far this plan has not been approved by the Monetary Commission, nor has any bill been introduced in Congress to carry out its provisions.

Organization and Capital

The plan provides for the organization under Federal Charter, with its head office at Washington, of a banking institution to be known as The Reserve Association of America, to have an authorized capital of $300,000,000, of which $150,000,000 shall be paid in, the balance remaining subject to call. This capital stock must be owned exclusively by national banks, each of which may subscribe for an amount equal to 20 per cent. of its own capital.

Relation to the Government

It is intended that the proposed institution shall be the fiscal agent of the United States Government, shall

receive on deposit moneys now lodged in the Treasury of the United States and in the Sub-Treasuries, and shall make disbursements for the government to all its creditors.

Earnings and Dividends

The net earnings of the Association are to be applied as follows. (1) A 4 per cent. dividend shall be paid to the stockholders (2) Earnings above that amount shall be divided, one-half to a surplus fund until that surplus shall amount to 20 per cent. of the paid-in capital stock, one-fourth to the Government of the United States, and the remaining one-fourth to the stockholders until their dividend shall reach 5 per cent (3) After that rate is earned in the manner stated, and a 20 per cent. reserve surplus has been created, all excess earnings shall go to the government.

Local Associations and Divisions

Each subscribing bank must be a member of an Association of National Banks not less than ten in number, and having a combined capital and surplus of not less than $5,000,000. These local associations are to be grouped into fifteen divisions.

Directors of Local Associations

The local associations shall elect Boards of Directors in the following manner: three-fifths of the number of directors shall be elected by representatives of the banks that are members of the local associations, each bank having one vote without reference to its size The remaining two-fifths shall be elected by the same representatives, but each shall be entitled to as many

votes as the bank which he represents holds shares in the Association.

Directors of Branches

The Board of Directors of each of the fifteen branches of the Reserve Association shall be composed of: (1) A group of directors equal in number to the number of local associations composing the district, elected by the directors of the local associations, each director having one vote. (2) A group of directors equal to two-thirds of the foregoing group and elected by stock representation. (3) A group of directors equal in number to one-third of the first group, representing the industrial, commercial, agricultural, and other interests of the district and elected by the votes of the first two groups, each director having one vote.

Directors of the Reserve Association

The Board of the Reserve Association shall consist of forty-five directors, chosen as follows (1) six-ex-officio members, namely, the Governor of the Reserve Association, who shall be Chairman of the Board; two Deputy Governors of the Reserve Association, the Secretary of the Treasury, the Secretary of Commerce and Labor, and the Comptroller of the Currency. (2) Fifteen directors to be elected, one by the Board of Directors, of each branch of the Reserve Association. (3) Twelve directors, who shall be elected by voting representatives, one representing the banks embraced in each district, each voting representative to cast a number of votes equal to the number of shares in the Reserve Association held by all the banks in the district which he represents. (4) The board thus constituted shall select twelve additional members, who shall fairly rep-

resent the industrial, commercial, agricultural, and other interests of the country, and who shall not be officers of banks.

The Directors of the Reserve Association shall elect an executive committee of nine members.

Executive Officers of the Reserve Association

The executive officers of the Reserve Association, consisting of a Governor and two Deputy-Governors, are to be selected by the President of the United States from a list submitted by the Board of Directors. Each shall have a seven year term of office and shall be subject to removal for cause by the President.

Concentration of Power Prevented

The distinctive feature in the manner of selecting directors of local associations, of branches and of the central association is the effort to prevent concentration of power in large banks. A similar purpose is revealed in providing that in both the branch associations and the central association there shall be directors chosen from outside who are not bank officials, but associated with the leading interests and enterprises of the country. In this particular the provision for the control of the association and all its subsidiaries is unique. It neither follows the rule in vogue in some countries of vesting the absolute power of selection in political officials, nor does it, on the other hand, vest entire control in those who own the stock.

Loans, Investments and Rates of Interest

The National Reserve Association may make three kinds of loans to banks having deposits with it. First, it may discount such notes and bills as have

a maturity of not more than twenty-eight days, and have been made at least thirty days prior to the date of rediscounting, provided that this paper arises from commercial transactions and is indorsed by any bank having a deposit with it. Such paper may be accepted by the central institution without any guaranty by the local association. The second class of investments consists in the rediscounting of notes or bills of exchange arising out of commercial transactions, having more than twenty-eight days, but not more than four months to run, in this case a paper must be guaranteed by the local association. A third form of discount which is evidently intended for times of some difficulty or stress is provided for as follows "Whenever, in the opinion of the governor of the National Reserve Association, the public interests so require, such opinion to be concurred in by the executive committee of the National Reserve Association and to have the definite approval of the Secretary of the Treasury, the National Reserve Association may discount the direct obligation of a depositing bank, indorsed by its local association, provided that the indorsement of the local association shall be fully secured by the pledge and deposit with it of satisfactory securities, which shall be held by the local association for account of the National Reserve Association, but in no case shall the amount loaned by the National Reserve Association exceed two-thirds of the actual value of the securities so pledged" In this third case the amount may be loaned irrespective of the time to run, if the direct obligation of the deposit bank is indorsed by the local association to which it belongs and is fully protected by satisfactory securities. The following provision in the Aldrich plan is especially important "The rate of discount of the National Reserve Asso-

ciation, which shall be uniform throughout the United States, shall be fixed from time to time by the executive committee and duly published." This provision prevents preference to the stronger banks or to those where money is more abundant, thereby naturally conferring a more immediate benefit upon portions of the country where rates of interest for any reason are high. The point most in its favor is that it establishes and gives a stability to the banking business throughout the United States. It would tend to relieve the pressure of smaller and weaker banks upon the stronger.

Purchases may be made to a limited amount from a depositing bank of acceptances of banks or houses of unquestioned financial responsibility Such acceptances must arise from commercial transactions and have a maturity not exceeding ninety days, and must be of a character generally known in the market as prime bills. They must bear the indorsement of the depositing bank selling the same, which indorsement must be other than that of the acceptor.

May Deal in Gold and Foreign Bills of Exchange

The association may also invest in United States bonds and in short term obligations—that is, obligations having not more than one year to run—of the United States, or of any State, or of certain foreign governments to be named in the act. It may also have power at home and abroad to deal in gold coin or bullion, and grant loans thereon, and in checks or bills of exchange payable in England, France, or Germany, and in such other countries as the Board of the Reserve Association may determine

The association shall have power to open and main-

tain banking accounts in foreign countries and establish agencies abroad for the purpose of purchasing and selling and collecting foreign bills of exchange. A proposed amendment to the national banking law authorizes the banks to accept commercial paper drawn on them having not more than ninety days to run, if properly secured and arising out of commercial transactions.

Resources of the Reserve Association

The loanable funds of the central reserve association would be made up of the $150,000,000 paid up capital and the 20 per cent. surplus as provided in the proposed act. To this should be added the deposits of government funds and deposits received from banks which hold stock in the association. These deposits from banks would be very materially increased by a permission to be incorporated in the proposed plan which would allow banking institutions to make deposits with the Reserve Association from their required reserves. Under existing law these reserves must be retained by the banks in their vaults. It is an essential feature of the plan that the association, unlike reserve banks under the present arrangement, shall not pay interest on reserves or other money deposited with it. To all these resources of the association should be added the notes which it may issue.

Note Issues

National banks are forbidden to issue further notes and whenever any portion of their existing circulation is withdrawn, the right to reissue it is permanently surrendered. The Reserve Association must for a period of one year offer to purchase at a price not less than par and accrued interest the 2 per cent.

bonds now held by national banks and deposited to secure their circulating notes. These bonds are to be taken over by the Reserve Association with the existing currency privilege attached and as fast as notes secured by these bonds are redeemed, notes to an equal amount issued by the Association will be substituted, the intention being to retire as rapidly as possible all bond secured circulation and to substitute therefor the notes of the Reserve Association. For a period of ten years the Association agrees to hold the bonds so purchased, but after two years, with the approval of the Secretary of the Treasury, it may dispose annually of $50,000,000 of the bonds held by it to secure circulation. If the government should issue bonds at a higher rate of interest than 2 per cent., the Reserve Association shall have the right to exchange at par the government bonds which it may have acquired from the national banks, but shall pay upon its notes secured by such new bonds an increased rate of taxation equal to the additional interest in excess of 2 per cent. The further right exists to issue additional notes with a graded tax beginning at 3 per cent. on the first $100,000,000 and reaching 6 per cent for all amounts above $300,000,000. This second class of notes, however, must be covered to the extent of at least one-third by gold or other lawful money and the remaining portion by bonds of the United States or bankable commercial paper. The notes of the Reserve Association are made legal tender except for obligations of the government which are by their terms specifically payable in gold.

State Banks

It is conceded to be desirable that state banks, capitalized savings banks, trust companies, and mutual

savings banks should become members of the Reserve Associations and subscribe to its stock. The objection to their membership is based upon the lack of uniform and adequate regulations governing the amount of their capital and reserve, and the varying degrees of strictness in their supervision and management.

A plan has been suggested under which any of these banks may become a member provided it has a capital and surplus not less than that required for a national bank in the same location, and maintains against its demand deposits a reserve of like character in the same proportion as that required of national banks; also that each institution shall agree to submit to such examination and comply with such requirements as may from time to time be prescribed by the National Reserve Association.

Objects to Be Secured

The manifest objects to be secured by the Reserve Association are: first, a concentration of the reserves of banks and their utilization for the support of the banking institutions of the country; second, a safe and efficient currency system under which circulating notes can be issued in such quantities and at such times as shall be demanded by the requirements of business.

Comparison with Central Banks of Europe

The proposed reserve association differs materially from a central bank in that its capital is exclusively held by banks, and that in its dealings it does not enter into the same competition with them that an independent institution would. The plan recognizes

the advantages of a restriction of the note issuing privilege to a single institution—a method which has met with approval in most other countries. In this respect as well as in its proposed function as the fiscal agent of the government it resembles the central banks of Europe.

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